THE

INSOLVENT LAWS

OF

MASSACHUSETTS,

WITH

NOTES OF DECISIONS.

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PREFACE.

THE present edition of the "Insolvent Laws of Massachusetts" contains the original Act of 1838, and all the subsequent statutes of the Commonwealth relating to the same subject. All the decisions upon those statutes, which have been made by the Supreme Judicial Court down to the present time, have been noted, and the cases referred to. So far as possible I have cited the volume of Cushing's Reports, in which the cases that have not yet been reported will appear. For the means of referring to unpublished cases, I am principally indebted to the present reporter.

The Act of 1851, for the distribution of the effects of insolvent corporations, is appended, with references to the corresponding provisions of the general insolvent laws.

Commissioners appointed in 1831, on the subject of the laws relating to debtor and creditor, in the same year reported the bill for the relief of insolvent debtors and the more equal distribution of their effects, which, with some slight amendments, was adopted by the Legislature in

1838. The report of the commissioners accompanying and recommending the bill is so full and clear in explanation of the principles on which the law is founded, and of the provisions of the law in detail, that its insertion here needs no apology.

JOSEPH CUTLER.

BOSTON, July, 1853.

PREFACE

TO THE FIRST EDITION.

In the administration of the Insolvent Laws of this Commonwealth, a book containing all these laws, and the decisions in cases arising under them, in a form convenient for frequent reference, has been long desirable. The want of such book has been much felt by those who have had occasion to take a part in such administration. The present publication is made for the purpose of supplying that want. It is hoped that the purpose has been accomplished.

The plan of the work was adopted with a view to its practical utility. It was thought that a mere publication of the statutes, noting, in the margin, such changes and additions as have been made by subsequent statutes, and the decisions of questions which have arisen under the laws, in their appropriate places, would make the book more useful than a systematic arrangement of topics.

It is believed that all the decisions of the Supreme Judicial Court relative to the Insolvent Laws have been collected. Through the kindness of the reporter, the editor has been enabled to refer to the cases to be reported in the

eighth and ninth volumes of Metcalf's Reports. The rulings of the Court of Common Pleas and of the Supreme Judicial Court at *nisi prius* have been referred to, when known; as also the decisions of a single judge of the Supreme Court sitting in Chancery. Decisions relative to the Bankrupt Law of 1841, made by our own courts and the courts of the United States, have been cited when applicable by analogy, but no attempt has been made at completeness of reference to this class of cases. In a few instances, the decisions of Judges of Probate and Masters in Chancery have been alluded to.

The Forms of Proceedings, which are appended, are for the most part such as are used in the County of Suffolk, with some slight variations. They were added on the recommendation of others, who have been intimately acquainted with the practice under the Insolvent Laws, as well as on account of their importance in the view of the editor.

JOSEPH CUTLER.

Boston, June, 1846.

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INSOLVENT LAWS OF MASSACHUSETTS.

INTRODUCTION.

No insolvent law was enacted in Massachusetts until 1838. The act of April 23, 1838, c. 163, "for the relief of insolvent debtors and for the more equal distribution of their effects," went into operation from and after the first day of August of that year, and, with many modifications, alterations, and additions, has been in operation ever since; except that it was suspended for about a year while the bankrupt law of 1841 was in force. The United States bankrupt law of 1841 went into operation in February, 1842, and at once suspended the operation of the insolvent law, so far, at least, that no proceedings could be afterwards instituted under it, by or against persons who were within the purview of the bankrupt act. *Ex parte Eames*, 2 Story, 322; *Griswold* v. *Pratt*, 9 Met. 16; *Judd* v. *Ives*, 4 Met. 401. See also *Sturgis* v. *Crowninshield*, 4 Wheat. 196; *Ogden* v. *Saunders*, 12 Wheat. 263; *Carter* v. *Sibley*, 4 Met. 298; *Blanchard* v. *Russell*, 13 Mass. 1.

In *Griswold* v. *Pratt*, proceedings instituted under the insolvent law after the bankrupt law went into operation and before the insolvent law was suspended by statute, the debtor being within the purview of the bankrupt law, were held to be unauthorized and void; although no proceedings under the bankrupt law had been instituted by or against him.

In *Ex parte Eames*, proceedings were instituted under the insolvent law after the bankrupt law went into operation, and an assignee was duly appointed under that law. Afterwards proceedings were instituted under the bankrupt law, and the Circuit Court held the proceedings in insolvency to be void, and issued an injunction to restrain the assignee from interfering with the property of the debtor.

But this consequence of the bankrupt act is limited to cases instituted under the insolvent law subsequent to the period when the bankrupt law

went into operation; and it did not supersede or suspend proceedings rightfully commenced under the insolvent act before the bankrupt law went into operation. *Judd* v. *Ives*, 4 Met. 401. In that case the petition was filed, and the first publication of notice of the issuing of the warrant to the messenger made, before the bankrupt law went into operation, but the assignee was not chosen and the assignment was not made until afterwards. And it was held, that the assignment, whenever made, related back to, and took effect from, the time of the first publication of notice; which for this purpose is to be deemed and taken as the time of the institution of the proceedings; the act of publication divesting the debtor of his property and placing it in the custody of the law, in the person of the messenger.

And it seems that the bankrupt law did not suspend the insolvent law in respect to its operation upon persons within the purview of the insolvent law and not within that of the bankrupt law. *Ex parte Eames*, 2 Story, 322, 325; *Griswold* v. *Pratt*, 9 Met. 16. So the insolvent law of 1838 was held to repeal by implication the assignment law of 1836, c. 288, so far as the two statutes affected the same class of persons. *Carter* v. *Sibley*, 4 Met. 298. But the Chief Justice, in delivering the opinion of the court in that case, said, the insolvent law did not affect the assignment law in its application to debtors not embraced by the former.

It was decided by the Circuit Court of the United States for Massachusetts, in 1847, that the insolvent law did not abrogate assignments at common law for the benefit of creditors. *Adams* v. *Blodgett*, 2 Woodb. & M. 233. That was a case where a creditor who had not assented to the assignment sued the debtor, and summoned his assignee in the assignment as trustee. The assignment did not contain a provision for the release of the debtor, and purported to convey all the debtor's property, and was executed by creditors to an amount greater than the property assigned. But in a recent case it has been decided by the Supreme Judicial Court, that an assignment at common law by a debtor for the benefit of all his creditors is void against parties not assenting to it, as repugnant to the spirit and conditions of the insolvent law. *Wyles* v. *Beals*, Suffolk, 1853.

In that case, H. & B., partners, having failed in business, by indenture under seal made an assignment of all their partnership property, but not of their separate property, to W., in trust for the benefit of all their creditors, but upon the express condition that all the creditors of H. & B. should execute the assignment in thirty days after its date, otherwise to be void. By the indenture the proceeds of the assigned property were to be distributed in the same manner that it would have been had the assignment been made under the insolvent law; the assignee was authorized to pay off mortgages and liens upon the assigned property, and the debtors were to be released. Nearly all the creditors executed the indenture

within the thirty days; some did not, and a new writing was made, extending the time within which the indenture might be signed to four months. Subsequently another paper writing under seal was executed by the debtors, the assignee, W., and nearly all the creditors, annulling altogether the condition of the said indenture requiring its execution in thirty days, and otherwise confirming it, and authorizing the assignee to retain in his hands a *pro rata* dividend to be paid to such creditors as should not execute the indenture within a reasonable time, and, in case they should not execute the same, to pay over the sum so retained to H. & B. The indenture was executed by creditors to an amount exceeding the value of the property assigned. A creditor who had not signed either of the said papers sued H. & B., and summoned W. as their trustee, in which action judgment was recovered by default and execution thereon was returned wholly unsatisfied, whereupon *scire facias* was issued against W., in which proceeding the assignment of H. & B. was held to be void as against the plaintiff, as being repugnant to the spirit and conditions of the insolvent law. The court, however, seem to be of opinion that the assignment in this case was void at common law, so that this case can scarcely be considered as conclusive of the general question as to the validity of common law assignments.

By the statute of March 3, 1842, c. 71, the insolvent law of 1838 was suspended, except the twentieth section, while the bankrupt law should continue in force, by which questions arising from a conflict of the general and State laws were avoided in future cases.

The bankrupt law was repealed, March 3, 1843, and the insolvent law thereby consequently revived.

ACT PASSED APRIL 23, 1838. CHAPTER 163.

AN ACT FOR THE RELIEF OF INSOLVENT DEBTORS, AND FOR THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Institution of Voluntary Proceedings.

SEC. 1. Any debtor (1) residing in this Commonwealth, who shall desire to take the benefit of this act, may apply by petition to the judge of probate (2) for the county within which he resides, or in which he has his usual place of business, setting forth his inability to pay all his debts, and his willingness to assign all his estate and effects for the benefit of his creditors, and praying that such proceedings may be had in the premises as in this act are provided; and if it shall appear to the satisfaction of the said judge that the debts due from such applicant amount to not less than five hundred dollars,(3) the said judge shall forthwith, by warrant under his hand and seal, appoint some suitable person (4) as messenger to take possession of all the estate, real and personal, of such debtor, excepting such as may be by law exempted from attachment, and of all the deeds, books of account, and papers of such debtor, and to keep the same safely until the appointment of assignees as hereinafter provided. (5)

(1) An alien resident in Massachusetts is entitled to the benefit of the insolvent law. *Judd* v. *Lawrence*, 1 Cush. 531.

A debtor who was decreed a bankrupt under the bankrupt law of 1841,

but who has not obtained his discharge under that law, or whose discharge has been refused, is entitled, since the repeal of that law, and the consequent revival of the insolvent law, to proceed and take the benefit of the latter. *Fisher* v. *Currier*, 7 Met. 424.

So, after proceedings have been had against an insolvent debtor under the insolvent law, and his discharge has been refused on appeal to the Supreme Judicial Court according to the provisions of that law, he is entitled to the benefit of the law on a new petition. But it must appear, however, in such case, that the applicant owes debts to the amount of two hundred dollars, which were not provable under the former proceedings, to authorize the issuing of a warrant. *Gilbert* v. *Hebard*, 8 Met. 129. And it seems to have been so considered by the court in the case of *Fisher* v. *Currier*, 7 Met. 424, 427.

As to what debts are provable, and the effect of the assignment and discharge, in such cases, see notes to sections 3, 5, and 7.

(2) By the seventeenth section of this statute masters in chancery are invested with the same jurisdiction, power, and authority which the statute gives to judges of probate.

By the act of 1848, c. 304, this jurisdiction of judges of probate and masters in chancery is taken away and conferred upon commissioners of insolvency to be appointed by the Governor, one in each county of the State. By the act of 1851, c. 322, the number of commissioners may be increased to three in each county. And by the act of 1852, c. 112, an additional one is authorized in Worcester County.

By the third section of the statute of 1846, c. 168, judges of probate and masters in chancery are required to make monthly returns to the Secretary of the Commonwealth of the names and occupations of all persons applying for the benefit of the act, and of all persons proceeded against by creditors during the month next preceding, and the time when the proceedings in each case were commenced. And it is the duty of the Secretary to enter the same in a book to be kept open for the inspection of the public.

(3) The act of 1841, c. 124, § 1, extends the provisions of the statute to debtors owing not less than two hundred dollars.

The petition by a debtor for the benefit of the insolvent law is evidence of the truth of all the facts stated therein, except of the alleged indebtedness of the petitioner. That may be proved by any evidence satisfactory to the commissioner; and the issuing of the warrant, with its statements and recitals, by necessary implication amounts to an adjudication of his satisfaction. So far as the insolvent and others in privity with him are concerned, the petition is conclusive; and if an attaching creditor or other person affected is in danger of suffering, he has a remedy by summary application to the Supreme Judicial Court. *Holbrook* v. *Jackson*, 7 Cush., Suffolk, 1851.

(4) The tenth section of the statute of 1844, c. 178, requires that the warrant shall, in all cases, be directed to the sheriff, or either of his deputies, in the county in which the debtor resides, or last resided.

(5) A warrant without a seal is invalid; and on discovery of such defect the proceedings under it may be treated as void, and new proceedings be instituted by petition founded upon the same debts. *Perry Manuf. Co.* v. *Brown*, 10 Law Reporter, 264.

The warrant to the messenger, and publication of notice thereof, divest the debtor of his estate, so that title cannot be made under or from him after that date by attachment or trustee suit. *Perry Manuf. Co.* v. *Brown*, 10 Law Reporter, 264. Nor can the debtor make any transfer of his property, or do any act to affect the rights of his creditors. *Judd* v. *Ives*, 4 Met. 401, 403.

An attachment or seizure under process from a court of the United States, made after publication of notice, is invalid; and so though the property has not been reduced to possession by the messenger or the assignee. *Perry Manuf. Co.* v. *Brown*, 10 Law Reporter, 264.

Notice of Warrant. — First Meeting of Creditors. — Choice of Assignees.

SEC. 2. The said messenger shall forthwith give public notice by advertisement, in such newspapers as shall be designated by the judge, and also such personal or other notice to any persons concerned as the judge shall prescribe, which notice shall state that a warrant has issued against the estate of such debtor, and that the payment of any debts, and the delivery of any property belonging to such debtor, to him or for his use, and the transfer of any property by him, are forbidden by law; and the messenger shall, in the same notice, call a meeting of the creditors of such debtor to prove their debts and to choose one or more assignees of his estate; (6) which meeting shall be held at some convenient time and place, to be designated in the warrant, the time to be not less than ten days, and not more than thirty days, after the issuing of the warrant. (7) And the said judge shall attend the said meeting, and shall allow all the debts that shall be duly proved before him, and shall cause a list

thereof to be made, which shall be certified by himself, and shall be recorded and filed with the other papers and proceedings in the case. And the creditors shall then proceed, in the presence of the said judge, to choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value of the creditors according to the debts then proved: (8) provided that when the number of creditors present shall amount to five and less than ten, the votes of two at least shall be necessary for a choice, and when the number of creditors shall amount to ten or more, the votes of three at least shall be necessary for a choice. And in case no choice shall be made by the creditors at said meeting, the said judge shall appoint one or more assignees. And in case any assignee so chosen shall fail to express in writing his acceptance of the trust within four days, the judge of probate may fill any vacancy occasioned thereby.

(6) By the act of 1851, c. 138, persons having business with the commissioners of insolvency have the right to select the newspapers for the publication of legal notices ordered by them. But any commissioner may order their publication in one other paper if he deems it necessary.

The messenger is now required to send written notice of the first meeting of creditors to all creditors on the debtor's schedule. Act of 1848, c. 304, § 8.

The warrant to a messenger directed him to call a meeting of creditors to be held on the twenty-sixth day of December, and on that day the messenger returned his warrant setting forth that he had served it as therein directed; the meeting was held, debts proved, an assignee chosen, and an order issued for a second meeting; on the twenty-eighth day of December it was discovered that the messenger gave notice that the first meeting was to be held on the twenty-eighth instead of the twenty-sixth; on petition by the creditors to the Supreme Court for a mandamus to the master in chancery, it was held by Dewey, J. that the proceedings were void, and the master was directed to stay all further proceedings under the warrant, and issue a new warrant on the same petition, and the assignee to deliver up the property in his hands to the messenger. *Ex parte Wedge*, 10 Law Reporter, 117.

(7) The first section of the statute of 1844, c. 178, which provided that judges of probate and masters in chancery should hold meetings of credi-

tors on the second Monday of each month only, so far repealed this provision that the first meeting of creditors might be held more than thirty days after the issuing of the warrant, at least if held on the first regular day for holding meetings after a lapse of ten days from the issuing of the warrant. *Ex parte Baker*, 8 Law Reporter, 461, S. J. C. January, 1846. Whether such meeting might have been held within less than ten days has not been decided. But the first and second sections of the statute of 1844 were repealed by the second section of the statute of 1846, c. 168. And by the act of 1848, c. 304, § 6, all warrants must be made returnable in not less than ten nor more than sixty days from the issuing of the same.

(8) Inasmuch as a creditor, holding collateral security for his debt, is authorized by the statute (sec. 3) to deliver up the same only to the assignees, and in such case to prove the whole amount of his debt; and inasmuch as the value of the collateral security can be ascertained, by sale or otherwise, only through the assignee and creditor, so that proof can be made of the excess of the debt above the value of the security, it follows that a creditor holding collateral security cannot prove his debt, or any part of it, until after an assignee has been chosen or appointed, and, consequently, is not entitled to a vote in the choice of an assignee. *Ex parte Baker*, 8 Law Reporter, 461, S. J. C. January, 1846.

So, where a creditor, holding collateral security, executed a release of the same, before the master, to the "assignee hereafter to be chosen," and he was then allowed to prove his whole claim and vote for an assignee, it was held that nothing passed by the release, as there was no party in existence to receive it; and that the proceeding was irregular, the assignee not duly elected, and the assignment void. *Ex parte Baker*, 8 Law Reporter, 461, S. J. C. January, 1846.

Proof of Debts. — Set-off. — Collateral Security.

SEC. 3. All debts due and payable from such debtor, at the time of the first publication of the notice of issuing the said warrant, may be proved and allowed against his estate assigned as aforesaid; and all debts then absolutely due, although not payable until afterwards, may be proved and allowed as if payable presently, with a discount or rebate of interest, when no interest is payable by the contract, until the time when the debt would become payable; and all moneys due from such debtor on any bottomry or respondentia bond, or on any policy of insur-

ance, may be proved and allowed, in case the contingency or loss should happen before the making of the first dividend, in like manner as if the same had happened before the said first publication of the said notice; and in case the debtor shall be liable for any debt, in consequence of having made or indorsed any bill of exchange or promissory note before the first publication of the said notice, or in consequence of the payment, by any party to any bill or note, of the whole or any part of the money secured thereby, or of the payment of any sum by any surety of the debtor in any contract whatsoever, although such payment in either case shall be made after the said first publication, provided it be made before the making of the first dividend, such debt shall be considered, for all the purposes of this act, as contracted at the time when such bill or note or other contract shall have been so made or indorsed, and may be proved and allowed as if the said debt had been due and payable by the said debtor before the said first publication; and all demands against the debtor for or on account of any goods or chattels wrongfully obtained, taken, or withheld by him, may be proved and allowed as debts, to the amount of the worth of the property thus taken; and no debt other than those above mentioned shall be proved or allowed against the estate assigned as aforesaid. (9) And when it shall appear that there has been mutual credit given by the debtor and any other person, or mutual debts between them, the account between them shall be stated, and one debt shall be set off against the other, and the balance of such account, and no more, shall be allowed or paid on either side respectively. (10)

And when any creditor shall have any mortgage or pledge of any real or personal estate of the debtor, or any lien thereon, for securing the payment of any debt claimed by him, the property so held as security shall, if he require it, be sold, and the proceeds shall be applied towards the payment of his debt, and he shall be admitted as a cred-

itor for the residue thereof, if any; and such sale shall be made in such manner as the judge shall order, and the creditor and the assignee respectively shall execute all such deeds and papers as may be necessary or proper for effecting the conveyance. And if the creditor shall not require such sale, and join in effecting the conveyance as aforesaid, he may release and deliver up to the assignees the premises so held as security, and shall thereupon be admitted as a creditor for the whole of his said debt. And if the said property shall not be either sold, or released and delivered up as aforesaid, the creditor shall not be allowed to prove any part of his said debt. (11)

(9) As to proof of partnership debts, see § 21 and notes thereto.

A debt payable in work is provable. *Barker* v. *Mann*, 4 Met. 302. Unless a claim against an insolvent debtor is an absolute *debt*, payable unconditionally and not subject to any contingency, it is not provable. The mere qualified liability of a member of a manufacturing corporation for the debts of the corporation, under the statute of 1808, c. 65, § 6, is not a debt which can be proved against the estate of an insolvent. *Kelton* v. *Phillips*, 3 Met. 61. The statute creating the liability of members of such corporations pointed out the mode in which the remedy might be pursued, and that mode alone can be adopted. *Leland* v. *Marsh*, 16 Mass. 389. The subsequent statute of 1821, c. 38, rendered the liability of members of manufacturing corporations thereafter to be established more general and complete, without any provision as to the mode of enforcing such liability, leaving it subject to the general rules of law. Whether a claim arising under the latter statute would be provable against the estate of a member of a corporation has not been decided. *Kelton* v. *Phillips*, 3 Met. 61.

It seems that all fiduciary debts were provable under this statute as it was originally, before any amendment. *Gilbert* v. *Hebard*, 8 Met. 129; *Fisher* v. *Currier*, 7 Met. 424. But they are expressly made provable by the third section of the statute of 1844, c. 178.

The holder of a bill of exchange, no part of which has been paid, may prove it in full in insolvency against the estate of each party thereto, and receive a dividend from each upon his whole claim, provided he does not receive in all more than the whole amount of the bill; but any proof sought to be made after he has been paid any part of his claim, can be only for the unpaid balance. *Sohier* v. *Loring*, 6 Cush. 537.

The holders of bills of exchange drawn or indorsed by G. and accepted

by M. proved them in insolvency against the estate of G., and afterwards made a composition with M. whereby M. conveyed certain property in trust to pay one fifth of the amount of the bills, which conveyance the holders of the bills accepted, reserving their remedies against the other parties. It was held, that the bill-holders who applied to prove their claims against the estate of G. before entering into composition with M. were entitled to prove the full amount of their bills; but that those who applied to prove their claims against the estate of G. after joining in the composition with M. could prove only the amount due them after deducting the one fifth secured by the composition. *Sohier* v. *Loring*, 6 Cush. 537.

Where a debtor who was declared a bankrupt under the bankrupt law of 1841, and failed to obtain his discharge under that law, applies for the benefit of the insolvent law since the repeal of the bankrupt law, debts which were due before the bankruptcy, and provable under the proceedings in bankruptcy, are, so far as they have not been discharged by actual payment, provable under the proceedings in insolvency, at the election of the creditors holding them. But they are not embraced by the proceedings in insolvency, unless the creditor elect that they shall be, and signify such election by proving them. *Fisher* v. *Currier*, 7 Met. 424.

So, where a debtor's discharge is refused by the Supreme Judicial Court, in proceedings under the insolvent law, on appeal from the decision of a judge of probate or master in chancery refusing the same, and new proceedings are had on a new application of the debtor, debts provable under the former proceedings are not affected by the subsequent proceedings. But a creditor under the former proceedings may elect to prove under the new, and, by thus becoming a party to the proceedings, he will perhaps subject himself to all the consequences of them. *Gilbert* v. *Hebard*, 8 Met. 129.

Where the discharge of a partner, obtained in proceedings in insolvency against all the partners, is annulled, a debt proved against the partnership estate may be proved against the separate estate of such partner on his becoming again insolvent. *Gates* v. *Mack*, 5 Cush. 613.

A discharge obtained by a bankrupt under the bankrupt law of 1841 bars a creditor embraced by it from enforcing his claim against the bankrupt, or property acquired by him subsequent to his bankruptcy, but does not affect any claim, lien, or interest which the creditor may have acquired in or upon any fund or property of the bankrupt before his bankruptcy. Therefore, where a debtor obtained his discharge under the insolvent law before the passage of the United States bankrupt law of 1841, and afterwards obtained his discharge under the latter, it was held that the discharge in bankruptcy was no bar to the proof of debts under the proceedings in insolvency, at any meeting of creditors held after such discharge was obtained, although such debts were due upon contracts entered

into before the insolvent law went into operation. *Minot* v. *Thacher*, 7 Met. 348.

A judgment recovered after the first publication of notice of issuing the warrant against the defendant, upon a debt contracted before that time, is not provable against his estate, because it was not in existence when the proceedings were instituted; and the debt upon which it was recovered is not provable, because it is merged in the judgment. *Sampson* v. *Clark*, 2 Cush. 173; *Woodbury* v. *Perkins*, 5 Cush. 86; *Mann* v. *Houghton*, 7 or 8 Cush., 4 Law Reporter, N. S. 388, S. J. C. Worcester, 1851; *Faxon* v. *Baxter*, S. J. C. Suffolk, 1853.

The insolvency of the defendant was suggested in a suit, pending exceptions taken by him. The exceptions being overruled, the Supreme Court directed that no execution issue on the judgment, but that a certificate go, &c. stating the amount of debt and costs, to be allowed as a debt proved in insolvency, the costs to be paid in full. *Morris* v. *Briggs*, 3 Cush. 342. There is probably a mistake in the report of this case. There is nothing stated in it to authorize the direction that the costs be paid in full.

The statute of limitations does not run against a claim upon an insolvent debtor, after the publication of notice of the issuing of the warrant, so as to prevent proof of the claim, (if not barred by that statute at the time of such publication,) at a meeting of the creditors, held after it would otherwise have been barred. *Minot* v. *Thacher*, 7 Met. 348. See also *Willard* v. *Clarke*, 7 Met. 435.

A creditor is not concluded by the proof of his debt. He may afterwards withdraw his proof and pursue another remedy, if he has one. *Bemis* v. *Smith*, 10 Met. 194. See also *Morse* v. *The City of Lowell*, 7 Met. 152, 154; *Kimberly* v. *Ely*, 6 Pick. 440. Subject, however, to the right of appeal from the decision of the commissioner allowing the withdrawal, to the Supreme Court, as in other cases. *Safford* v. *Slade*, S. J. C. Suffolk, 1853. In this case the proof was allowed to be withdrawn on the ground that it had been made by mistake.

Whether after proof of a debt the commissioner has authority, without some order or direction of the Supreme Judicial Court, to revise and reverse his own former decision allowing proof, and to decide, upon new facts and new views of the law, that such proof shall be expunged, *quære*. *Agawam Bank* v. *Morris*, 4 Cush. 99, 104.

The statute is silent in respect to the allowance of interest upon claims, thereby leaving it to be regulated by the established rules of law. In all cases, when interest upon a claim would be recoverable in an action at law, at the time of the first publication of notice of issuing the warrant, interest to the amount then due may be proved as a part of the debt. *Brown* v. *Lamb*, 6 Met. 203. See note to § 13 of the act of 1838.

When a former certificate of discharge is objected, by the assignee, to the proof of a debt, the creditor may impeach the validity of the discharge so set up, and the question of its validity may be tried and decided by the commissioner. *Gates* v. *Mack*, 4 Cush. 48.

(10) An administrator who has in his hands a distributive share of his intestate's estate, which belongs to an insolvent debtor, cannot withhold it from the debtor's assignee for the purpose of paying himself, by way of set-off, a debt due to him in his own right from such debtor. *Davis* v. *Newton*, 6 Met. 537.

If the maker of a note discounted by a bank becomes insolvent, having money deposited in such bank at the time, the bank may set off the amount of the note against that of the deposit, and the assignee of the maker will be entitled to receive the balance only, provided the note is due absolutely, though not payable until afterwards. The balance in such case is to be ascertained as of the time of the first publication of notice; and if the note does not become payable until afterwards, a rebate of interest on the note must be made accordingly. *Demmon* v. *Boylston Bank*, 5 Cush. 194.

In an action by an assignee upon a covenant of warranty contained in a deed of land to the debtor, the defendant may set off notes and accounts due him from such debtor. And the same set-off may be made in an action on the covenant brought by a purchaser from the assignee with notice of the claim. And this may be done, though the defendant has already proved such debts in insolvency, and the master before whom they were proved has refused to allow the proof to be withdrawn, and ordered a dividend thereon; which, however, the defendant had not received. *Bemis* v. *Smith*, 10 Met. 194.

(11) A creditor who holds property as collateral security for the payment of his debt, whether by mortgage or pledge, cannot, under the provisions of the statute, prove his claim at the first meeting of creditors; at least, not until after an assignee has been chosen or appointed. When a creditor holds such security, the statute provides that the property shall be disposed of under the order of the judge, to be executed by the creditor and *assignee*, the proceeds to be applied towards the payment of the debt, and proof of the residue to be allowed; or that the property shall all be given up to the *assignee*, and the creditor allowed to prove his whole debt; and that if the property shall not be so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt, — neither of which prerequisites of the statute can be complied with, unless there be an assignee in existence. *Ex parte Baker*, 8 Law Reporter, 461, S. J. C., January, 1846, at Boston.

Where an insolvent has sold or mortgaged an equity of redemption, the mortgaged property cannot be sold on the application of the first mort-

gagee. But where the second mortgagee also applies to have the equity of redemption sold, the whole property may be sold under the order of the master in chancery; the proceeds to be applied first to the payment of the first mortgagee's debt, and the surplus, if any, to that of the second mortgagee. *Hunnewell* v. *Goodrich*, 3 Cush. 469.

A minor entered into a partnership which was dissolved before he became of age; and he thereupon assigned all his interest in the concern to his copartner, who gave his note for the amount, secured by mortgage of the partnership property, and afterwards became insolvent. It was held that the minority of the mortgagee constituted no objection to his proceeding under the statute to have the property sold and the proceeds applied towards the payment of his debt; and that he was not precluded from availing himself of his mortgage, by having caused the same property to be attached for the mortgage debt; which attachment was dissolved by the insolvency of the mortgagor. *Barnard* v. *Eaton*, 2 Cush. 294.

It is not necessary that the collateral security should have been given by the debtor against whose estate a claim is offered to be proved, in order to bring the case within the provisions of this section. It is sufficient if the collateral security was given to secure the debt offered, although by a third person liable for the same. A, B, and C were the makers of notes, A being in fact the principal debtor, and B and C sureties. A alone gave to the payee a mortgage of land to secure the payment of the notes. All the makers of the notes became insolvent, and obtained their discharges under the insolvent law. The payee offered, and claimed to prove, the whole amount of his debt, without deducting the value of the mortgaged property, against the estate of B. It was held that the case was within the equity, if not the letter, of the statute, and that the value of the mortgage must be deducted from the amount of the debt, and proof of the residue only allowed, as in cases where a mortgage has been given by the insolvent against whose estate the debt is offered for proof. *Lanckton* v. *Wolcott*, 6 Met. 305.

A principal debtor gave to his surety on several notes a mortgage of certain property, conditioned to secure and indemnify him against the payment of such notes. After a part of the notes had become barred by the statute of limitations, the estate of the principal was assigned under the insolvent laws, and it was held that the surety was authorized to apply the mortgaged property first to the payment of the notes on which he was still liable, and that the residue must be distributed *pro ratâ* among the holders of the other notes, they having an equitable lien on the mortgaged property; but that the surety could not pay some of the debts on which he was discharged, out of the mortgaged property, to the entire exclusion of others, and thus in fact prefer a part of such creditors to the injury of others whose lien was the same. *Eastman* v. *Foster*, 8 Met. 19.

It was held also in that case, that, notwithstanding the liability of the surety upon the notes had ceased by reason of the bar of the statute of limitations, and although the property of the mortgagee in the mortgaged premises had become absolute by foreclosure, as against the mortgagor, the surety held such mortgaged property subject to the equitable lien of all the holders of such notes, and in trust for the payment of them; that the trust was not secret, the mortgage having been duly recorded, thus giving constructive notice of it to all creditors and purchasers, so that they could not, by attachment or grant, take it discharged of the trust; and that an assignment under the insolvent law could not defeat the trust.

Where one of two makers of a note become insolvent, and his co-maker gave an indorser of the note security to indemnify him against it, it was held that this was not collateral security of which the holder could avail himself, and that he might prove the note to the full amount against the estate of the insolvent, without obtaining the surrender of such collateral security. *Agawam Bank* v. *Morris*, 4 Cush. 99. See *De Wolf* v. *Chapin*, 4 Pick. 59.

Where an application for the sale of mortgaged property under this section is opposed on the ground that the mortgage is fraudulent as to creditors, it is not sufficient to allege fraud generally, but the answer must set forth the particular acts of fraud. *Barnard* v. *Eaton*, 2 Cush. 294.

A manufacturing corporation has no lien upon the shares of its capital stock owned by a stockholder, for his general indebtedness to the company. *Mass. Iron Co.* v. *Hooper*, 7 Cush., Suffolk, 1851.

There is no provision in the statute for an appeal from the order of a judge of probate respecting the disposition and application of property in which any or all the creditors of an insolvent are interested. The remedy of a party injured, in such case, is by petition in the nature of an appeal to the Supreme Judicial Court, under the eighteenth section of the statute. *Eastman* v. *Foster*, 8 Met. 19.

A petition to the Supreme Court represented that the petitioner was the owner of a note secured by mortgage of personal property against an insolvent debtor; that he applied to the master in chancery before whom the proceedings were instituted for a sale of the mortgaged property under the statute, who refused to grant the same; and that the petitioner claimed an appeal from the decision of the master, and gave notice of such appeal to him and the assignee. The conclusion of the petition claimed an appeal to the Supreme Court, and prayed that the petition for a sale of the property might be heard before that court, and that they would make such order and decree thereon as law and justice might require. The court entertained the petition as an original application, and held that they might, under the statute, revise the decisions of masters in chancery in this mode of proceeding, in all cases where an appeal is not given by the statute. *Barnard* v. *Eaton*, 2 Cush. 294.

Of Proof on Oath.— Of Appeal from Allowance and Disallowance of a Claim.— Costs of Appeal.

SEC. 4. The said judge may, in his discretion, require proof on oath of any debt claimed before him, and may examine the party claiming the same, or the agent who shall present the claim in his behalf, and also the debtor, on their respective oaths or affirmations, on all matters relating to such claim. (12) And any supposed creditor, whose claim shall be wholly or in part rejected by the judge, may appeal (13) from his decision, and have the said claim determined at law; and if the debt demanded shall exceed the sum of three hundred dollars, such appeal shall be heard and determined in the Supreme Judicial Court, (14) otherwise in the Court of Common Pleas; and the appeal shall be entered in the proper court which shall be first held, (15) within or for the county in which the proceedings are had, next after the expiration of fourteen days from the time of claiming the appeal; but no such appeal shall be allowed unless the same be claimed, and notice thereof be given to the judge or his clerk, to be entered on the record of the proceedings, and also to the assignees, or one of them, within ten days after the decision appealed from. (16) And upon entering such appeal, the creditor shall file in court a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, and the assignees shall plead or answer thereto in like manner; and the like proceedings shall be had upon the joining of any issue of fact or law, and also upon the nonsuit or default of either party, as in any action for the same cause, commenced and prosecuted in the usual manner; excepting only that no execution shall be awarded against the assignees for the amount of the debt, if any, recovered by the creditor. And if the assignees shall be dissatisfied

with the allowance of any claim by the judge, they may appeal (17) from his decision, and have such claim determined at law; and such appeal shall be claimed, notified, heard, and determined in like manner, and the like proceedings shall be had thereon in all respects, as are before prescribed in the case of an appeal by a creditor; and in both cases the final judgment of the court appealed to shall be conclusive in the premises; provided, however, that any party aggrieved by the judgment of the Court of Common Pleas, upon any matter of law arising on the trial of such appeal, may except thereto in the manner provided in the eighty-second chapter of the Revised Statutes, and the judgment in such cases, being certified to the said judge of probate, shall ascertain the amount, if any, due to the claimant; and the list of debts shall be altered, if necessary, to conform thereto. And the party prevailing in such suit shall be entitled to costs, to be taxed and recovered as in common actions, against the adverse party, which costs, if recovered against the assignees, shall be allowed to them out of the estate of the debtor. (18)

(12) By the act of 1848, c. 304, § 14, proof must be made on the oath of the creditor in all cases. By the acts of 1851, c. 349, § 1, and 1852, c. 189, §§ 1 and 2, the oath of his agent or attorney is all that can be required in certain cases.

(13) Where a debt has been allowed generally, an appeal does not lie from a refusal of the commissioner to allow any part of it as a privileged debt, as for wages of an operative. *Thayer* v. *Mann*, 2 Cush. 371.

(14) An appeal does not lie to the Supreme Judicial Court, unless the claim in question exceeds the sum of three hundred dollars on the day of the first publication of notice. Where a claim is founded on a note for three hundred dollars, which has not matured at that time, the appeal must be taken to the Court of Common Pleas. *Whiting* v. *Gray*, 9 Met. 291.

(15) If an appeal regularly taken be not entered at the next term of the proper court, it cannot be afterwards entered at any subsequent term. *Ex parte Decoster*, 7 Law Reporter, 189, S. J. C. Suffolk, 1844. Even though the omission to enter it at the proper term occurred through the negligence or mistake of counsel. *Palmer* v. *Dayton*, 4 Cush. 270. And the Supreme Court has not jurisdiction under the eighteenth section

of this act to grant relief in such cases. *Palmer* v. *Dayton*, 4 Cush. 270. Nor will consent of parties that such appeal may be entered at a term different from that fixed by law for such entry, give the appellate court jurisdiction. *Eddy's Case*, 6 Cush. 28.

(16) The record of the proceedings in insolvency is conclusive of the time when the decree is made, and the notice must be given within ten days from that time. *Leigh* v. *Arnold*, 5 Cush. 615.

(17) Such appeal by assignees vacates the allowance appealed from, and pending the appeal, the creditor, the allowance of whose debt is appealed from, cannot vote or act in the proceedings, and if he does, all proceedings affected by the vote of such creditor will be vacated. *In the Matter of Macy*, 5 Law Reporter, N. S. 21, S. J. C. Suffolk, 1851. But by the act of 1852, c. 293, such creditor is allowed to assent to the debtor's discharge, and his assent will be effectual if his claim is allowed on the appeal, and not otherwise.

(18) When the assignee of an insolvent debtor appeals from the allowance by a judge of probate, or master in chancery, of a claim against such debtor, and on the trial of the appeal the plaintiff recovers judgment, although for a sum less than that allowed him by the judge or master, he is the prevailing party in the suit, within the meaning of the statute, and is entitled to costs. *Stevens* v. *Hale*, 7 Met. 85.

In that case the word "suit," in the statute, is relied upon by the court as decisive of the rights of the parties. In delivering the opinion of the court, Mr. Justice Wilde said: "The appellee has prevailed in her *suit*, although the appellant has prevailed in his appeal."

Of the Assignment, and its Effect.

SEC. 5. The said judge shall, by an instrument under his hand and seal, assign and convey to the person or persons chosen or appointed assignees as aforesaid, all the estate, real and personal, of the debtor, excepting such as may be by law exempted from attachment, with all his deeds, books, and papers relating thereto; which assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken in execution on any judgment against him, at the time of the first publication of the notice of issuing the above-mentioned warrant, al-

though the same may then be attached on mesne process as the property of the said debtor; (19) and such assignment shall be effectual to pass all the said estate, and dissolve any such attachment; (20) and the said assignment shall also vest in the said assignees all debts due to the debtor, or to any person for his use, and all liens and securities therefor, and all his rights of action for any goods or estate, real or personal, and all his rights of redeeming any such goods or estate; and the assignees shall have power to redeem all mortgages, conditional contracts, pledges, and liens, of or upon any goods or estate of the debtor, or to sell the same, subject to such mortgage or other encumbrance. (21) And the debtor shall likewise, at the expense of the estate, make and execute all such deeds and writings, and indorse all such bills, notes, and other negotiable papers, and draw all such checks and orders for moneys deposited in banks or elsewhere, and do all such other lawful acts and things, as the assignees shall at any time reasonably require, and which may be necessary or useful for confirming the assignment so made by the said judge, and for enabling the assignees to demand, recover, and receive all the estate and effects assigned as aforesaid, especially such part thereof, if any, as may be without this Commonwealth; (22) and the assignees shall have the like remedy to recover all the said estate, debts, and effects, in their own names, as the debtor might have had if no such assignment had been made. (23) And if, at the time of such assignment, any action shall be pending in the name of the debtor, for the recovery of any debt, or other thing, which might or ought to pass to the assignees by the said assignment, the assignees shall, if they require it, be admitted to prosecute such action in their own names, in like manner and to the like effect as if the same had been originally commenced by them as such assignees; and no suit pending in the name of the assignees shall be abated by the death or removal of any assignee, but upon the

motion of the surviving or remaining assignee, or of the new assignees, as the case may be, he or they shall be admitted to prosecute the suit in like manner and to the like effect as if the same had been originally commenced by him or them. And in all suits prosecuted by the assignees for any debt, demand, right, title, or interest due or belonging to the insolvent debtor, the assignment made to them by the judge shall be conclusive evidence of their authority to sue as such assignees. (24) And if the debtor shall die after the issuing of the above-mentioned warrant, the proceedings shall, notwithstanding, be continued and concluded in the like manner, and with the same validity and effect, as if he had lived; and in such case the allowance to the debtor on the net produce of his estate, if any shall become due, according to the provision hereinafter contained, and if the same shall not have been paid to him in his lifetime, shall be paid to his executors or administrators, and shall be disposed of and distributed in like manner as any other property of which he may be possessed at the time of his decease.

(19) It is generally true, that, by force of the assignment, the assignees stand in the place of the debtor in respect to all property (except such as may by law be exempted from attachment) and rights of property belonging to the debtor, and may claim such property and enforce such rights in the same manner, and to the same extent, which the debtor himself might have done, at the time of the first publication of notice of the issuing of the warrant to the messenger; subject, nevertheless, to all rights and equities of others, which are unaffected by the assignment, and may be set up and maintained against any claim of the assignee, in the same manner and to the same extent as if such claim were made by the debtor himself. In cases of fraud, however, the assignees may have greater rights than the debtor himself. As if the debtor has made any sale or transfer of property fraudulent as to creditors, but valid as between the parties, in such case the assignees rather stand in the place of the creditors, and may avoid such sale or transfer, although the debtor himself could not have done so. *Briggs* v. *Parkman*, 2 Met. 258; *Clarke* v. *Minot*, 4 Met. 346; *Mitchell* v. *Winslow*, 2 Story, 630; *S. C.*, 6 Law Reporter, 347; *Ex parte Foster*, 2 Story, 131; *S. C.*, 5 Law Reporter, 55.

It seems that an assignee may sell real estate conveyed by the insolvent in fraud of his creditors, without first bringing an action to recover the same of the insolvent's grantee. *Gibbs* v. *Thayer*, 6 Cush. 30.

An insolvent, having a life estate in land of his wife, had before his insolvency conveyed the same with covenants of warranty against all persons claiming by, through, or under him; the assignee sold and conveyed all his interest in the land at public auction, and the insolvent became the purchaser; and it was held that he was estopped by the covenants in his deed to set up a title so acquired from his assignee against his own grantee. If his own conveyance was not in fraud of creditors, the assignee's sale passed no title, and if it was fraudulent, then this fraud constituted an encumbrance upon his title which he was bound by his covenants to remove. *Gibbs* v. *Thayer*, 6 Cush. 30.

The *first publication of notice*, within the meaning of the statute, wherever mentioned, as well as in this section, is the first public notice of the issuing of the warrant to the messenger, by advertisement in some newspaper, according to the direction to the messenger by the judge or master who issues the warrant. It is the time of such public notice to which the assignment relates back, although not executed until afterwards, and from which it takes effect. And unless such public notice be given, an assignment, under the statute, never can take effect. Mere personal notice is not sufficient to give it force, although given individually to every creditor and every debtor of the insolvent debtor. *Clarke* v. *Minot*, 4 Met. 346; *Briggs* v. *Parkman*, 2 Met. 258.

Therefore rights perfected or acquired by any person, against an insolvent debtor, or to his property, before such publication of notice, although after the issuing of the warrant, and even after actual notice that a warrant has issued, are equally available against the assignees as if perfected or acquired before the issuing of the warrant. Where a mortgage, executed before the issuing of the warrant, was not recorded by the mortgagee until after actual notice of the warrant, but before publication of notice in any newspaper, it was held to be valid against the claim of the assignee to the mortgaged property. *Briggs* v. *Parkman*, 2 Met. 258.

So, where one charged as trustee of an insolvent debtor, by a judgment in the trustee process, paid over the amount in his hands, on execution, after notice that a warrant had issued against the estate of such insolvent debtor had been personally served on him by the messenger, under the direction of the judge who issued the warrant, but before publication of notice, it was held that the trustee was discharged from any liability to the assignee, afterwards appointed, on account of the debt attached by the trustee process. *Clarke* v. *Minot*, 4 Met. 346.

That case was distinguished from those in which the law requires an act to be done for the mere purpose of giving notice, and regards the

doing of it as implied notice. In those cases, parties will be affected with express notice, although the act implying it has not been done. "The distinction is," as stated by the court, "that the publication under the insolvent act of 1838, although one purpose of publication is to give notice of the proceedings, is not required for the purpose of giving notice of another substantive and efficient act, but is itself the act which gives effect and operation to the subsequent deed of assignment; fixes the time at which it takes effect; and without which such subsequent assignment has no effect to transfer the debtor's property."

The particular point of time at which notice is to be considered as made public has never been fixed by the court, and is a question of considerable doubt. In *Clarke* v. *Minot*, Mr. Chief Justice Shaw said: "Whether such notice may be considered as made public by advertisement, when the advertisement, duly signed, is delivered to the printer at the office of publication, with orders to print it in the next paper, or by putting it in type and striking it off on paper, or by the first delivery of one of the newspapers containing it, it is not necessary in this case to decide; nor, if the latter is required, is it necessary now to decide whether the publication must await the regular day of publication of the newspaper, or whether it would be a publication by advertisement within the statute, to anticipate the day of publication, by striking off, issuing, and distributing an extra number of such newspaper."

If a person, to whom an insolvent debtor is heir, dies after the issuing of the warrant against the estate of the insolvent, but before the first publication of the notice of it, the distributive share of the debtor vests in him immediately on the death of the intestate, and consequently passes to the debtor's assignee, who is bound to claim it for the use of creditors. And it is no excuse for the assignee's neglect to claim and receive such share, that he may be obliged to give bond to refund the whole or part thereof to the administrator of the deceased, on certain contingencies. For if the creditors neglect or refuse to indemnify the assignee, he may retain such distributive share in his own hands until his liability to refund has ceased. *Davis* v. *Newton*, 6 Met. 537; *Ex parte Newhall*, 2 Story, 360; *S. C.*, 5 Law Reporter, 306. See also *Hayward* v. *Hayward*, 20 Pick. 517.

If a deed of conveyance be not accepted by the grantee until after the first publication of the notice of the issuing of a warrant against the estate of the grantor, although executed by the grantor, and recorded before that time, the property intended to be conveyed passes to the assignee. A debtor, without the knowledge of his creditor, executed a mortgage of personal property to secure the debt, and caused it to be recorded, and appointed a third person to act in behalf of the mortgagee. Soon after, the estate of the mortgagor was assigned under the insolvent law. After-

wards he delivered the mortgage to the mortgagee, who accepted it. Upon these facts it was held that the mortgaged property passed to the assignee, and that the mortgagee had no interest in it. *Dole* v. *Bodman*, 3 Met. 139.

The owner of wood cut and packed upon his land sold a portion of it, which was measured and marked off to the buyer, who was to have a year to remove the same. Before its removal the buyer became insolvent; and it was held that the property in the wood had vested in the buyer and passed to his assignee, but that the seller retained a lien thereon for the price. And so, though the seller had taken a promissory note for the price payable in six months, which had not matured or been negotiated, and though the bill of sale had been given up after the insolvency of the buyer, and though after the year had elapsed the seller had sold a portion of the same wood to other persons. *Arnold* v. *Delano*, 4 Cush. 33.

When property is conveyed in mortgage by a debtor to his surety, to indemnify him against the payment of the debt, the creditor acquires thereby an equitable lien on such mortgaged property, to the extent of the amount of his debt. This lien continues after the surety is relieved from personal liability by the bar of the statute of limitations, and is not affected by an assignment of the estate of the mortgagor under the insolvent law, either before or after a foreclosure of the mortgage. *Eastman* v. *Foster*, 8 Met. 19.

A clerk in the store of a dry-goods dealer has no authority, unless expressly given, to pledge or hypothecate the goods of his employer; and if he undertakes to do so to secure a debt due from his employer, the assignee of the employer, on his insolvency, will be entitled to the property so pledged or hypothecated. *Nash* v. *Drew*, 5 Cush. 422.

All the right and interest of the debtor in and to any real estate, at the time of the first publication of notice, pass by the assignment to the assignee; but the rights and interests of other persons in the same are not affected by the assignment, and may be enforced to the same extent against the assignee, that they might have been against the debtor. A right of dower, which may have attached in favor of the wife of the debtor, is not discharged or affected by the assignment. But no right of dower attaches in favor of the wife of a member of a partnership, in respect to real estate purchased by the partnership for the partnership business, and with partnership funds, which is not subject to a superior claim of the creditors of the partnership. If the partnership, therefore, be in fact insolvent, an assignment under the insolvent law passes such real estate, unencumbered by any rights of dower in the wives of the several partners. *Burnside* v. *Merrick*, 4 Met. 537; *Dyer* v. *Clark*, 5 Met. 562; *Howard* v. *Priest*, 5 Met. 582.

Where a mortgage of personalty provided that the mortgagor might sell

the mortgaged property and substitute in its place after-acquired property, which was done; and the mortgagor became insolvent, the mortgagee not having taken possession of such after-acquired property; it was held that the mortgagee had no lien thereon, and that it vested in the assignee. *Moody* v. *Wright*, 13 Met. 17. See *Jones* v. *Richardson*, 10 Met. 481.

A power is revocable by the insolvency of him giving it. Mortgagors gave to a creditor an order on another creditor secured by mortgage on personalty, directing the mortgagee to sell the mortgaged property, and after paying his own debt to apply the proceeds to the debt of the payee in the order, the property being in the possession of the mortgagors. Before the mortgagee sold the same or took possession of it, one of the two mortgagors became insolvent. It was held that the power was revoked, that the payee took no interest in the property by his order, and that the same vested in the assignee. *Fuller* v. *Emerson*, 7 Cush., Suffolk, 1851.

A mortgagee entered for condition broken to foreclose the mortgage; and it was agreed between him and the mortgagor that he, the mortgagee, should receive the rents and profits of the mortgaged premises and apply the same to another debt held by the mortgagee against the mortgagor, and not secured by the mortgage. Before any rents were received by the mortgagee, the mortgagor became insolvent. It was held that the rents afterwards received by the mortgagee must be applied to the mortgage debt, the power to apply them to the other debt having been revoked by the insolvency of the mortgagor who gave it. *Hilliard* v. *Allen*, 4 Cush. 532.

An infant whose estate is assigned under the insolvent laws cannot revoke a transfer of property previously made by him in payment of his wife's debts, contracted before marriage, so as to vest that property in his assignee. *Butler* v. *Breck*, 7 Met. 164.

The assignment does not revoke an order previously drawn by the debtor, *bonâ fide*, on one of his debtors, in payment of one of his creditors, and accepted by the drawee, though the order be not paid at the time of the first publication of the notice of the warrant. *Butler* v. *Breck*, 7 Met. 164. And where an order was drawn and accepted, payable out of any funds of the drawer which should come to the hands of the drawee, and the funds did not come to the hands of the drawee until *after* the estate of the drawer was assigned under the insolvent law, it was held, in an action by the payee against the acceptor, that the order was *primâ facie* an assignment of the fund, and that, in the absence of evidence that it was without consideration, or otherwise fraudulent, the plaintiff was entitled to recover; the fund to the amount of the order not vesting in the assignee under the insolvent law. *Bourne* v. *Cabot*, 3 Met. 305.

Where an insolvent debtor, before institution of insolvent proceedings

in his case, delivered a note in which he was payee to his surety for the expenses of such proposed proceedings, it was held, in an action on the note by the surety against the maker, that the latter could not set up in defence that the title to the note was in the assignee of the payee, in the absence of fraud in the transaction; and that whether the payee actually indorsed the note before or after the institution of proceedings in insolvency, was immaterial. *Fogg* v. *Willcutt*, 1 Cush. 300.

A second assignment of the same person's estate, under the insolvent law, will pass to the assignee only such property as the debtor has acquired since the first publication of notice in the former proceedings. *Minot* v. *Thacher*, 7 Met. 348; *Gilbert* v. *Hebard*, 8 Met. 129. So where a person has been declared a bankrupt under a bankrupt law of the United States, property acquired by him subsequent to his bankruptcy alone will pass by a subsequent assignment under the insolvent law. *Fisher* v. *Currier*, 7 Met. 424.

The grant by an assignee in insolvency of a tenancy at will of the insolvent terminates the tenancy. *Cooper* v. *Adams*, 6 Cush. 87. A reversioner, with the consent of the tenant for life in the land, built a house thereon and occupied it. Such house is real and not personal estate, and cannot be occupied by the purchaser of the real estate of the reversioner from his assignee in insolvency, without the consent of the tenant for life. *Cooper* v. *Adams*, 6 Cush. 87.

(20) The assignment dissolves all attachments of property as belonging to the insolvent, made since the insolvent law went into operation, on mesne process issuing from any court of this State. And although made before the first publication of notice, and on a debt accruing on a contract entered into before the insolvent law went into operation. *Bigelow* v. *Pritchard*, 21 Pick. 169. But it does not dissolve an attachment made before the passing of the insolvent act. Such attachment is a "right," within the meaning of the saving clause of the twenty-fifth section of the statute. *Kilborn* v. *Lyman*, 6 Met. 299.

An attachment made during the suspension of the insolvent law, by the statute of 1842, is not a "right," within the meaning of such saving clause, and is dissolved by an assignment made under the insolvent law since its revival by the repeal of the bankrupt law of 1841. Rights, to come within the purview of that clause, must have accrued before the insolvent law went into operation on the 1st of August, 1838. *Ward* v. *Proctor*, 7 Met. 318. It seems that, but for the saving clause in the twenty-fifth section, attachments made before the insolvent law of 1838 went into operation, would have been dissolved by assignments under it. *Ward* v. *Proctor*, 7 Met. 318. See also *Kilborn* v. *Lyman*, 6 Met. 299.

By the act of Congress of March 14, 1848, attachments made on mesne process issuing from courts of the United States are dissolved by the in-

solvency of the defendant. Before that act an assignment under the insolvent law did not dissolve an attachment made on mesne process issued from a United States court. *Springer* v. *Foster*, 2 Story, 383; *S. C.*, 6 Law Reporter, 107; *Towne* v. *Smith*, 1 Woodb. & Minot, 115; *S. C.*, 9 Law Reporter, 12. See *Carter* v. *Sibley*, 4 Met. 298.

But an attachment on mesne process issued from a court of this State, at the suit of a citizen of another State, for the breach of a contract to be performed in that State, is dissolved by the assignment. *Grant* v. *Lyman*, 4 Met. 470. And an attachment on mesne process from a court of the United States, made after the first publication of notice of the insolvency of the defendant, is ineffectual. *Perry Manuf. Co.* v. *Brown*, 10 Law Reporter, 264.

An attachment is dissolved, although judgment is recovered before the assignment takes effect, if the execution is not levied until after the first publication of notice. *Andrews* v. *Southwick*, 13 Met. 535; *Ward* v. *Proctor*, 7 Met. 318. But if the levy be commenced before the first publication, it is sufficient, and the levy is valid against the assignment, although not completed until afterwards. *Cushing* v. *Arnold*, 9 Met. 23.

A levy on real estate takes effect, and vests the title in the judgment creditor, from the time of the seizure; and if, after the seizure, the estate of the debtor is assigned under the insolvent law, the land levied on does not pass by the assignment, although the appraisers are not appointed and the estate is not set off until afterwards. *Hall* v. *Hoxie*, 3 Met. 251.

When attached property is sold before judgment, by consent of parties, and the money arising from the sale is in the attaching officer's hands, a delivery to him of the execution which issues on a valid judgment afterwards recovered, with a direction to satisfy it from such money, is tantamount to a levy; and if so delivered before the first publication of notice of the insolvency of the debtor, his assignees have no claim on the officer for such money, although he has made no return on the execution, nor paid the money to the judgment creditor. *Eastman* v. *Eveleth*, 4 Met. 137.

But when property, attached on mesne process, is sold by consent of parties before judgment, and judgment is not recovered until after the first publication of notice of the issuing of a warrant against the estate of the defendant, the right to the proceeds of the goods thus sold passes to the assignee by the assignment. *Wheelock* v. *Hastings*, 4 Met. 504.

So, though the officer pays over the proceeds to the attaching creditor without actual notice of the debtor's insolvency; and he may recover back the same from the creditor. *Edwards* v. *Sumner*, 4 Cush. 393.

An attachment is dissolved by the insolvency of the debtor, so that a title to the property attached cannot be made through him, though the assignee in insolvency does not take possession of or claim the same. *Codman* v. *Freeman*, 3 Cush. 306; *Shelton* v. *Codman*, 3 Cush. 318.

Attachments by the trustee process are within the meaning of the statute, and are dissolved by the assignment. *Clark* v. *Minot*, 4 Met. 346; *Kimball* v. *Morris*, 2 Met. 573. And where the trustee delays to answer until judgment day, and judgment is entered against him immediately on the filing of his answer, the assignee, although he knew that the trustee had funds in his hands, is not barred of his claim by not having claimed such funds before judgment against the trustee, according to the provision of the statute in case of a claimant; especially where notice of the assignment has been given to the trustee, and a demand made upon him by the assignee before the judgment. *Phelps* v. *Dunham*, in the Common Pleas, 8 Law Reporter, 26.

An attachment of the property of a partnership, by the trustee process, is not dissolved by the insolvency of one of the partners, and the assignment under the insolvent law of his separate estate only, after the partnership has been dissolved. *Fern* v. *Cushing*, 4 Cush. 357.

But where there was a tripartite agreement between the plaintiff, principal defendant, and trustee in a trustee process, by which the whole case was submitted to arbitration and the trustee promised to disclose in the trustee process such sum as should be found by the award to be due from him to the principal defendant, it was held that the trustee was liable, on his promise to the plaintiffs, for the amount so found to be due, and that, although the trustee did not disclose such sum until after the assignment of the estate of the principal defendant, he was not liable for the same to the assignees. *Caldwell* v. *Rice*, 6 Met. 493; *Woods* v. *Rice*, 4 Met. 481.

Whether the recovery of judgment, the issuing of execution, delivery of it to the officer, or a demand by him upon the trustee will prevent the dissolution of an attachment by the trustee process, by the insolvency of the debtor, *quære*. *Fern* v. *Cushing*, 4 Cush. 357.

An attachment in an action for a tort, as for a malicious prosecution, is dissolved by the assignment, although the claim on which such action is founded is not provable against the estate of the debtor. *Stetson* v. *Heyden*, 8 Met. 29.

Where an attachment is dissolved, all the consequences of the dissolution must follow. *Grant* v. *Lyman*, 4 Met. 470; *Kilborn* v. *Lyman*, 6 Met. 299; *Sprague* v. *Wheatland*, 3 Met. 416. Before the statute of 1841, c. 124, an attachment was dissolved by an assignment, although the property attached would not go to the assignees, by reason of a valid mortgage of the same, made subsequent to the attachment, and before the assignment took effect. *Grant* v. *Lyman*, 4 Met. 470. But by the fifth section of the statute of 1841, c. 124, where such would be the effect of dissolving an attachment, the assignees, with permission of the court to which the writ of attachment is returnable, may prosecute the suit to judgment, for the benefit of all the creditors.

Where an attachment of goods is dissolved by an assignment, the officer's bailee of the goods, who has undertaken to redeliver them to him, is discharged from his undertaking, although he has an indemnity against any loss he may sustain by it. *Sprague* v. *Wheatland*, 3 Met. 416.

Where property attached is replevied, and judgment is rendered for the defendant in replevin, he will be entitled to a return, although the property of the debtor has been assigned under the insolvent law; and he will thereupon be bound to deliver the same to the assignee. *Kimball* v. *Thompson*, 4 Cush. 441.

(21) The design of the statute was, that every right of property belonging to the debtor, whether in action or not, should pass to the assignee, and any one who affirms that a particular thing does not pass by the assignment, is bound to bring himself within the exceptions of the statute, or show conclusively *aliunde*, that it was the design of the makers of the law that the thing specified should not pass to the assignee. *Gray* v. *Bennett*, 3 Met. 522.

An insolvent's right of action to recover threefold the amount of interest paid by him on a usurious contract, passes by the assignment of his estate. *Gray* v. *Bennett*, 3 Met. 522; *Stevens* v. *Lincoln*, 7 Met. 525.

A partial payment, made upon a usurious contract, will be first applied to the payment of the amount legally due, and if the payment does not exceed that amount, no right of action accrues thereby to the debtor, to recover back money paid on account of a usurious contract. *Stevens* v. *Lincoln*, 7 Met. 525.

In an action brought by the assignee of an insolvent debtor, to recover back threefold the amount of interest paid, an averment that unlawful interest was paid to the defendant by such debtor is not supported by proof that the assignee himself paid the defendant a dividend on a usurious claim against such debtor's estate. *Stevens* v. *Lincoln*, 7 Met. 525.

Hoag v. *Hunt*, 1 Foster's N. Hamp. Rep. 106, was an action brought in New Hampshire, in which both plaintiff and defendant were citizens of Massachusetts; and it was held that a citizen of New Hampshire, who had been summoned as trustee in the action, could not be charged as trustee of the defendant, who, before the suit was brought, had applied for the benefit of the insolvent law of Massachusetts, and assignees had been appointed.

It is the right and the duty of assignees, under the statute, to possess themselves of the choses in action of a debtor's wife, for the benefit of his creditors, although the debtor has never reduced them to possession. But while the assignees are proceeding to reduce such choses in action to possession, or after they have obtained payment thereof, and before distribution is made of the debtor's estate, the wife may apply to the Supreme Judicial Court, by bill or petition, for a suitable provision to be

made for her out of the proceeds of such choses in action, and the court will make such provision according to the circumstances of the case; and cases may be where it would be proper to appropriate the whole of such property to the use of the wife and her children. *Davis* v. *Newton*, 6 Met. 537.

The assignee of an insolvent debtor may affirm a sale made by the debtor for the purpose of delaying and defrauding creditors, and receive the price of the goods from the vendee. And if, knowing all the facts of the case, the assignee brings an action to recover the price of the vendee, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he cannot, by discontinuing such action, and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them. *Butler* v. *Hildreth*, 5 Met. 49; *Perkins* v. *Webster*, 2 Cush. 480, 485.

A creditor brought suit against his debtors in this State, and attached personal property, which was receipted for. The receiptor carried the property to his residence in another State, where the same property was attached in a suit by the same creditor, upon the same cause of action; the receiptor permitting the attachment, and pointing out the property to the attaching officer. The defendants afterwards became insolvent, and their property was assigned under the insolvent law. The action in this State, by direction of the creditor, was not entered in court. Held, that the defendants in this suit so abandoned could not maintain trover against the receiptor to recover the property receipted for, and that their assignee stood in no better position than they did. *Chase* v. *Andrews*, 6 Cush. 114.

An insolvent debtor who has received his discharge is a competent witness for the assignee of his estate, on releasing to him all claim to the effects that may in any event remain in the assignee's hands. *Greene* v. *Durfee*, 6 Cush. 362.

(22) It seems that an insolvent, the assignment of whose estate takes effect after a seizure of his real estate on execution, but before it is set off by appraisement, may choose an appraiser to act in the levy of the execution. *Hall* v. *Hoxie*, 3 Met. 251.

(23) The assignee of an insolvent debtor may maintain a bill in equity in his own name, to recover of the respondent threefold the amount of interest paid to him by the debtor on a usurious contract. *Gray* v. *Bennett*, 3 Met. 522.

As to the recording or not recording a defeasance taken by a debtor who has made an absolute conveyance of land, his assignee stands upon the same footing with the debtor; his rights under it are precisely what the debtor had. *Stetson* v. *Gulliver*, 2 Cush. 494.

One of two insolvent debtors purchased of the assignee of their estate a

witnessed note belonging to the assets, which was made payable to them and not indorsed, and which was six years overdue. It was held that such purchaser might maintain an action on the note in the names of himself and his co-payee, for his own benefit. *Drury* v. *Vannevar*, 5 Cush. 442.

The purchaser from an assignee of a note payable to the insolvent or order, and not indorsed, may maintain an action thereon in the name of the insolvent. *Stone* v. *Hubbard*, 7 or 8 Cush., S. J. C. Worcester, 1851.

(24) In an action by an assignee for any of the purposes mentioned in this provision, the assignment is conclusive evidence of the plaintiff's right to sue, although the prior proceedings may have been defective and erroneous, and the assignee illegally appointed. The remedy of an aggrieved party in such case is by bill or petition to the Supreme Judicial Court. In a proper case, with proper parties, that court has full power, under the eighteenth section of this statute, to arrest the proceedings, if there has been an illegal and unauthorized appointment of one as assignee, and to order an injunction as to any suits at law, or other proceedings by such assignee, and to supersede and set aside the assignment. *Partridge* v. *Hannum*, 2 Met. 569; *Wheelock* v. *Hastings*, 4 Met. 504.

In *Wheelock* v. *Hastings* the court thus state the object of this provision, and the remedy of a party aggrieved by erroneous preliminary proceedings: "It seems to us that it was the policy of the law to provide that the regularity of the preliminary proceedings, and the right of the assignee to sue in his representative character, should not be called in question in every suit in which he has occasion to proceed against the debtors of the insolvent in order to gather in the effects. Such a course would be not only attended with great labor and expense, but another inconvenience would follow of still greater weight. In one suit and before one tribunal, an assignee might be prepared with the proofs of all the preliminary proceedings, and establish his representative capacity to the satisfaction of the court. In another court, for various causes, he might fail so to establish his character as representative of the insolvent. The statute contemplates an entire settlement of the estate of the insolvent, so that all his effects shall be applied, proportionally, to the payment of all his debts. So far as the statute fails of accomplishing this object completely, it fails of accomplishing its intended purpose. Hence, if the proceedings are irregular, it behooves all parties, once for all, to have the matter inquired into and settled; or if they are regular, that it may be established, once for all, and irrevocably, for the security of all persons. This cannot be done, as it appears to us, if the sufficiency of the preliminary proceeding may be inquired into and settled in each of the numerous suits which it may be necessary to bring in the settlement of an insolvent estate. Nor is it necessary to the security of the rights of any one that these inquiries should be opened in each particular suit; because sufficient provision is

made for trying and deciding the validity and legality of the proceedings, once for all, by which they may be superseded and set aside, if erroneous," upon the bill or petition of an aggrieved party to the Supreme Judicial Court, to be heard and determined by them as a court of chancery, as authorized by the eighteenth section.

As the assignment would be conclusive evidence of the authority of the assignee to maintain an action against an attaching officer, to recover the property attached, where the attachment has been dissolved by the assignment; so, in an action by the attaching creditor against the officer for not keeping the goods so that they might be forthcoming to satisfy an execution, the assignment is conclusive evidence to support the defence, that the attachment had been dissolved by it before judgment in the attachment suit. *Grant* v. *Lyman*, 4 Met. 470.

Duties of the Messenger. — Schedule of Creditors. — Examination of the Debtor, — his Allowance.

Sec. 6. The messenger shall, as soon as may be after his appointment, demand and receive from the debtor, and from all other persons, all the estate in his or their possession respectively, which is herein above ordered to be assigned, with all the deeds, books of account, and papers of the debtor, relating thereto; and the debtor shall accordingly deliver to the messenger such part of the said estate, and other things above specified, as may then be within his possession or power, and shall disclose the situation of such parts thereof as may then be in the possession of any other person or persons, so as to enable the messenger to demand and receive the same. (25) And the debtor shall also make a schedule, containing a full and true account of all his creditors, with the place of residence of each creditor, if known to the debtor, and the sum due to each of them. And the said schedule shall also set forth the nature of each debt, whether founded on written security, on account, or otherwise, and also the true cause and consideration thereof, and a statement of any existing mortgage, pledge, or other collateral security given for the payment of the same; which schedule

he shall produce at the first meeting of his creditors, to be delivered to the assignees who shall then be chosen. (26) And the debtor shall at all times before the granting of his certificate, as hereinafter provided, upon reasonable notice, attend, and submit to an examination on oath, before the judge and the assignees, upon all matters relating to the disposal of his estate, and to his trade and dealings with others, and his accounts concerning the same, and relating to all debts due or claimed from him, and to all other matters concerning his estate, and the due settlement thereof according to law; such examination to be in writing, when so required by the judge, and to be signed by the debtor, and filed with the other proceedings. (27) And the debtor shall receive from the assignees one dollar per day for his attendance on the judge or the assignees, when required as aforesaid. (28) He shall also be allowed out of his estate, for the necessary support of himself and his family, such sum, not exceeding the rate of three dollars per week for each member of his family, and for such time, not exceeding two months, as the judge shall order.

(25) A messenger is justified in locking a debtor's store, though unoccupied, and taking the key into his own possession. *Stevens* v. *Palmer*, 12 Met. 464.

A messenger who takes possession of the property of a debtor, by virtue of a warrant, is not liable to an action by the debtor for keeping possession after the judge of probate has disallowed the petitioning creditor's debt and dismissed the proceedings in insolvency, if the petitioning creditor appeals from the judge's decision and prosecutes his appeal, although that decision is affirmed by the appellate court. The messenger is not bound to decide at his own peril whether an appeal lies, nor whether the appellant has done all that is required by law to make the appeal allowable; but he is justified in retaining the goods while the appeal is pending, and if the decision of the judge is affirmed by the appellate court, or the appeal dismissed, he is not answerable to the debtor, unless he afterwards retains the property an unreasonable time. *Stevens* v. *Palmer*, 12 Met. 464.

If goods obtained by means of a fraudulent purchase, are seized under

a warrant of insolvency as the property of the buyer, the messenger may be proceeded against in replevin by the seller to recover the same, without a previous demand. *Bussing* v. *Rice*, 2 Cush. 48.

By the act of 1848, c. 304, § 15, perishable goods may be sold by order of the commissioner. Before that act, it was necessary in such a case to apply to the Supreme Judicial Court for authority to make such sale.

(26) This provision is amended by the second section of the statute of 1841, c. 124, so as to require the debtor to make a schedule of his real and personal property, to be delivered to the assignees at the first meeting of his creditors. And by the act of 1848, c. 304, § 8, the schedule of creditors must be delivered to the messenger.

In the case of *Burnside* v. *Brigham*, 8 Met. 75, where the plaintiff attempted to avoid a discharge of the defendant, which was obtained under the United States bankrupt law of 1841, it was held that the mere omission of the plaintiff's name, &c. from the bankrupt's sworn list of creditors, in the proceedings in bankruptcy, was not sufficient to avoid the discharge, although by reason of such omission the plaintiff had no notice of the proceedings in bankruptcy, and could not prove his debt; and that, to have such effect, it must appear that such omission was wilful and fraudulent.

(27) Where proceedings are instituted against an insolvent debtor on the petition of creditors, it is the duty of the insolvent to prepare and present his schedules, and submit himself to an examination, at the first meeting of his creditors, in the same manner as the debtor is required to do in the case of voluntary proceedings. *Kimball* v. *Morris*, 2 Met. 573; *Case of Thompson*, 7 Law Reporter, 159.

It seems that, at any time before a debtor has received his certificate of discharge, the judge may require him to be present at a meeting of his creditors, and submit to an examination on oath. *Kimball* v. *Morris*, 2 Met. 573. And if the debtor refuse or neglect to comply with such order, the judge may issue his warrant to arrest and imprison him until the order shall be complied with. *Kimball* v. *Morris*, 2 Met. 573; *Case of Thompson*, 7 Law Reporter, 159. See § 23.

In proceedings preliminary to the institution of involuntary proceedings against a debtor, he cannot be subjected to an examination on oath. *Ex parte Jordan*, 9 Met. 292.

In an examination of the debtor in proceedings in insolvency, he is entitled to have counsel present to consult with him in regard to answers which he may be called upon to give *vivâ voce*, and to prepare answers to such questions as may be put to him in writing. *In the Matter of Winsor*, 8 Law Reporter, 514, S. J. C. 1846.

(28) An insolvent is not entitled to the payment of his fees for attendance before he can be compelled to attend any meeting of his creditors, at which he is required by law to be present. *Case of Thompson*, 7 Law Reporter, 159.

Second Meeting. — Debtor's Discharge.

SEC. 7. The judge shall appoint a second meeting of the said creditors, to be held at such time, not more than three months after the date of the warrant to the messenger, (29) as the judge shall think fit, regard being had to the distance at which the creditors, or any of them, may reside, at which meeting any creditors who have not before proved their debts shall be allowed to prove the same. And the debtor shall then be allowed to amend the schedule of his creditors, and to correct any mistake therein; and he shall then make and subscribe an oath before the said judge, which shall be certified by him and filed in the case, in substance as follows: —

"I, ——, do swear that the account of my creditors, contained in the schedule made and signed by me, and now in the hands of the assignees chosen by my creditors, is in all respects just and true, according to my best knowledge and belief. And I do further swear that I have delivered to ——, the messenger appointed in that behalf, all my estate, (excepting such parts thereof as are by law exempted from attachment, and such as have been necessarily expended for the support of myself and my family,) and all my books of account and papers, relating to my said estate, that were within my possession or power when the same were demanded of me by the said messenger, that I have delivered to my assignees all such of my said estate, books, and papers as have since come to my possession, and that, if any other estate, effects, or other things, which shall or ought to be assigned and delivered to the said assignees, shall hereafter come to my knowledge or possession, I will forthwith disclose or deliver the same to the said assignees. And I do further swear, that there is not any part of my estate or effects made over or disposed of in any manner for the future benefit of myself or my family, or in order to defraud my creditors."

And if it shall then appear to the satisfaction of the judge, that the debtor has made a full disclosure and delivery of all his estate, as herein before required, and that he has in all things conformed himself to the directions of this act, the judge shall grant to him a certificate thereof, (30) and the debtor shall be thereupon absolutely and wholly discharged from all his debts which shall be at any time actually proved against his estate assigned as aforesaid, (31) and from all debts which are provable under this act, and which are founded on any contract made by him, after this act shall go into operation, if made within this Commonwealth, or to be performed within the same; and from all debts which are provable as aforesaid, and which are founded on any contract made by him after this act shall go into operation, (32) and due to any persons who shall be resident within this Commonwealth at the time of the first publication of the notice of the issuing of the warrant mentioned in the first section of this act; (33) and from all demands for or on account of any goods or chattels wrongfully obtained, taken, or withheld by the debtor, as mentioned in the third section of this act; (34) and the said debtor shall be also for ever discharged and exempted from arrest or imprisonment, in any suit, or upon any proceeding, for or on account of any debt or demand whatever, which might have been proved against his estate as aforesaid. (35) And the certificate to be granted by the judge, as above provided, shall be in substance as follows: —

Commonwealth of Massachusetts.

Suffolk ss.

To all people, to whom these presents shall come, I, A. B., Judge of Probate for the said County of Suffolk, send Greeting.

Whereas, it has been made to appear to me, that C. D. of B., in the said county of Suffolk, merchant, whose estate has been assigned for the benefit of his creditors, ac-

cording to the provisions of an act made and passed on the —— day of ——, in the year one thousand eight hundred and thirty-eight, entitled, "An Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," has made a full disclosure and delivery of all his estate as in said act is required; and that he has in all things conformed himself to the directions of the said act: I do accordingly certify, that, by force of the act aforesaid, the said C. D. is absolutely and wholly discharged from all his debts which have been or shall be proved against his estate, assigned as aforesaid, and from all debts which are provable under the said act, and which are founded on any contract made by him within this Commonwealth, or to be performed within the same, and made since the passing of the act aforesaid; (36) and from all debts which are provable as aforesaid, and which are founded on any contract made by him since the passing of said act, and due to any persons who were resident within this Commonwealth on the —— day of —— last, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of the said C. D.; and from all demands against him, for or on account of any goods or chattels wrongfully obtained, taken, or withheld by him; according to the form of the act aforesaid. (37) And I do further certify, that the said C. D. is, by force of the act aforesaid, for ever discharged and exempted from arrest or imprisonment, in any suit, or upon any proceeding, for or on account of any debt or demand whatever, which might have been proved against his estate assigned as aforesaid.

Given under my hand and seal on this —— day of ——, in the year ——————.

Provided, however, that if one half in number or in value of the creditors, who shall be creditors respectively for not less than fifty dollars, and who shall have duly proved their debts, shall by writing under their hands signify to the said judge of probate their dissent and objec-

tion to the granting of such certificate, the same shall not be granted; and in such case the debtor shall not be entitled to his discharge, unless he shall obtain the same upon appeal to the Supreme Judicial Court, as hereinafter prescribed. (38) *And provided further*, that no discharge of any debtor, under this act, shall release or discharge any person who may be liable for the same debt, as a partner, joint contractor, indorser, surety, or otherwise, for or with the debtor. (39)

(29) The provision of the seventh section of the act of 1838, that the judge shall appoint a second meeting of the creditors of an insolvent debtor, to be held within three months from the date of the warrant, is directory merely, and his failure to appoint such meeting to be held in that time does not render the proceedings absolutely void; and although he may not have the power to appoint such meetings after the lapse of a year, the Supreme Judicial Court may do so under its supervisory power given them by the act. *Kimball* v. *Loring*, 11 Law Reporter, 34, S. J. C. Suffolk, 1848.

But this direction was not repealed by the act of 1844, c. 178, § 4, the effect of which is to postpone the granting of the certificate of discharge six months after the date of the assignment. *Eastman* v. *Hillard*, 7 Met. 420.

The second meeting of the creditors of an insolvent debtor may be adjourned from day to day, and they may prove their debts and transact other business at any such adjourned meeting, with the same effect as at the original meeting. *Rice* v. *Wallace*, 7 Met. 431.

(30) Since the act of 1844, c. 178, went into operation, a certificate cannot be granted to a debtor until after a lapse of six months from the date of the assignment. And this rule embraces proceedings instituted before that statute was passed. *Eastman* v. *Hillard*, 7 Met. 420. See also *Ex parte Lane*, 3 Met. 213. See acts of 1844, c. 178, § 4, and 1848, c. 304, § 9.

An objection to granting a certificate on the ground that the debtor has not made a full disclosure and delivery of all his estate, as required by the statute, involves a charge of fraud and perjury, and demands strict proof to support it. *Ex parte Pearce*, 6 Law Reporter, 261. To support the objection, it must appear that there was a *wilful* concealment of property, on the part of the debtor; and although property be not, in fact, disclosed, if it was omitted through the mere mistake of the debtor as to his duty, it is no objection to granting his discharge. *Ex parte Wilson*, 6 Law Reporter, 272.

In the certificate of discharge to a debtor, the judge of probate is required to state that the debtor has in all things conformed himself to the directions of the statutes. It would seem, therefore, that a failure on the part of the debtor to comply with any requirement of the statutes, through mere ignorance of his duty in that respect, is a sufficient cause for refusing his discharge. The remedy of the debtor in such case is by application to the Supreme Judicial Court, under § 18 of this act. But it seems that the unintentional omission of a creditor in the debtor's schedule, by mistake of the debtor, is not sufficient cause for refusing a certificate. To have that effect, it must appear that the omission was wilful and fraudulent. *Burnside* v. *Brigham*, 8 Met. 75.

Omission by the debtor to file schedules of his debts and property as required by law, is ground for refusing to grant him a discharge; but if the record shows that he did file them at the proper time, it is conclusive of that fact. *Lothrop* v. *Tilden*, 8 Cush., S. J. C. Bristol, 1851.

As to effect of irregularity of proceedings upon the discharge, see notes to § 12 of this act, and the act of 1844, c. 78, § 4, note.

On the suggestion of the insolvency of the defendant in an action, it is in the discretion of the court to grant a continuance of the action, to await the result of his application for a discharge. *Barker* v. *Haskell*, 5 Law Reporter, N. S. 40, S. J. C. Suffolk, 1852.

Proof in insolvency of the debt of the plaintiff will not bar an action pending when the defendant became insolvent. *Barker* v. *Haskell*, 5 Law Reporter, N. S. 40, S. J. C. Suffolk, 1852.

By the fifth section of the statute of 1844, c. 178, if a debtor become a second time insolvent under the insolvent laws, a discharge cannot be granted to him unless his estate pay fifty per cent. on the amount of debts proved, without the assent, in writing, of three fourths in value of the creditors who have proved their claims. And by the sixth section of that statute, no discharge can be granted to a debtor becoming a third time insolvent under the insolvent laws. See *Tebbetts* v. *Pickering*, 5 Cush. 83; note to act of 1844, c. 178, § 5.

(31) Debts accruing on contracts made before the insolvent law went into operation, and debts due to citizens of other States, on contracts to be performed in those States, are debts from which the certificate of an insolvent does not discharge him, unless such debts are actually proved against his estate; in which case it does discharge him. It seems that fiduciary debts are within the purview of this provision of the statute, and that, unless they were proved against the estate of an insolvent, they would not be barred by his certificate; but before the statute of 1844, if fiduciary debts were actually proved against such estate, the insolvent's certificate would bar any action to recover them. *Fisher* v. *Currier*, 7 Met. 424; *Morse* v. *The City of Lowell*, 7 Met. 152; *Hayman* v. *Pond*,

7 Met. 328. The third section of the statute of 1844, c. 178, expressly excepts fiduciary debts from the operation of the certificate of an insolvent under the statute, although the creditors may have proved them against his estate, and received a dividend thereon.

By the act of 1848, c. 304, § 10, a claim for necessaries is not barred by a certificate unless proved.

A partner, after dissolution of the partnership, filed his petition for the benefit of the act as an individual and as late partner, and obtained his discharge, under the proceedings, from "all his debts"; and it was held that this discharged him from the debts of the partnership. *Lothrop* v. *Tilden*, 8 Cush., S. J. C. Bristol, 1851.

Since the repeal of the United States bankrupt law of 1841, if a debtor, who was declared a bankrupt, and failed to obtain his discharge under that law, applies for the benefit of the insolvent law, debts which were provable under the proceedings in bankruptcy are not barred by a certificate obtained by the debtor under the insolvent law, unless they have been actually proved under the proceedings in insolvency. But it seems that, if such debts have been actually proved against the insolvent's estate, his certificate will bar any action to recover them. *Fisher* v. *Currier*, 7 Met. 424. So, if a debtor who has failed to obtain his discharge in proceedings instituted under the insolvent law, applies for the benefit of that law by a new petition, debts which were provable in the former proceedings will not be barred by a certificate obtained under the subsequent proceedings, unless actually proved under them; and if so proved, it seems they will be barred by the certificate; but this point has not yet been settled. *Gilbert* v. *Hebard*, 8 Met. 129; *Fisher* v. *Currier*, 7 Met. 424, 430.

(32) A debt contracted after the statute of 1838 was passed, but before it went into operation, is not discharged by a certificate obtained by the debtor under that statute. *Washburn* v. *Bump*, 10 Met. 392.

Where the proceeds of goods transferred by an absolute bill of sale as collateral security for a debt, and sold by the creditor, are recovered of such creditor in a suit by a prior mortgagee of the goods, a discharge in bankruptcy of the debtor, pending that suit, is not a bar to the creditor's right of action against the debtor on the implied warranty of title. *Bennett* v. *Bartlett*, 6 Cush. 225.

(33) The effect given by the statute to a certificate of discharge obtained under it, is certainly as extensive as the Legislature had power to make it. The doctrine, as stated in the reports of this State, is, that a State may make laws providing for the discharge of a debtor on the surrender of his property, which shall operate upon future contracts made within such State, *by citizens thereof*, and which contracts, by their terms, are to be performed within the limits of such State. *Betts* v. *Bagley*, 12 Pick. 572; *Braynard* v. *Marshall*, 8 Pick. 194; *Agnew* v. *Platt*, 15

Pick. 417. In *Springer* v. *Foster*, 2 Story, 383, *S. C.*, 6 Law Reporter, 107, Mr. Justice Story says, that "no State insolvent laws can discharge the obligations of any contract made in the State, except such contracts as are made between citizens of that State." And see *Towne* v. *Smith*, 1 Woodb. & Minot, 115; 9 Law Reporter, 12.

The case of *Blanchard* v. *Russell*, 13 Mass. 1, (which was decided before any satisfactory decisions upon the subject had been made by the Supreme Court of the United States,) is the only case in the reports of this State in which the certificate of a debtor obtained under a State law has been held to discharge him from the claim of a citizen of another State. But in all cases, a contract, to come within the operation of a certificate obtained under a State law, must, in its nature or by its terms, be a contract to be performed within that State. *Braynard* v. *Marshall*, 8 Pick. 194.

A discharge is not a bar to an action on a promissory note brought by the payee, who was at the time the note was made, and has ever since continued to be, a citizen of another State, against the maker. *Tebbetts* v. *Pickering*, 5 Cush. 83.

An action by a citizen of Connecticut, as successor of the payee of the note declared on, is not barred by the certificate of discharge of the defendant, the note not having been proved. *Clark* v. *Hatch*, 7 Cush., 4 Law Reporter, N. S. 329, S. J. C. Berkshire, 1851.

A, a citizen of Massachusetts, ordered goods of B, a trader in Connecticut, which were sent to him; A afterwards received his discharge under the insolvent law; held, that this was not a bar to an action against A for the price of the goods, by B, who had not proved his claim under that law. *Woodbridge* v. *Allen*, 12 Met. 470.

A note made by a firm in this State, payable to their own order, and indorsed by them to a firm in New York, is not barred by a discharge of the makers and indorsers under the insolvent law, the indorsees not having proved their claim thereon under these laws. *Savoye* v. *Marsh*, 10 Met. 594.

Where a bill is drawn in Maine, the drawer and payee both being citizens of that State, on a citizen of Massachusetts, who accepts the same, a certificate of discharge obtained by the acceptor under the insolvent laws is not a bar to an action on the bill by the payee, who has not proved his claim thereon under those laws. *Fiske* v. *Foster*, 10 Met. 597.

Where a note was made in Massachusetts, both parties being at the time citizens of that State, and was on its face made payable in that State, and the payee soon afterwards, in pursuance of a previously formed intention, removed to another State, where he continued to reside until the time of bringing an action on the note in Massachusetts against the maker, it was held that the action was barred by the discharge of the maker under

the insolvent laws, obtained after the making of the note. *Brigham* v. *Henderson*, 1 Cush. 430.

An agent in Boston sold hay for his principal, who resided in Maine. The agent made out the bill in his own name, but at the time of the sale stated to the buyer that he was selling the hay on account of a person in Maine, but without naming him. The buyer afterwards became insolvent and obtained his discharge. In an action against him for the price of the hay, brought in the name of the owner of the hay, it was held that the discharge was not a bar. *Ilsley* v. *Merriam*, 7 Cush., 4 Law Reporter, N. S. 37, S. J. C. Suffolk, 1851.

To an action on a note in favor of creditors in New York against the maker in Boston, the defendant filed a special plea alleging that, after the note in suit was overdue, being then owned by the plaintiffs, the defendant applied for the benefit of the insolvent law; that defendant at that time owed another debt to the plaintiffs, and it was agreed by the plaintiffs that, if the defendant would obtain the payment of such other debt, they would prove the note in suit in the proceedings in insolvency; that the defendant caused such other debt to be paid, and afterwards obtained his discharge, and that the plaintiffs did not prove the said note in insolvency. It was held that the contract set up in defence of the action could not avail, the contract itself being tainted with illegality, and contrary to the policy of the insolvent laws. *Downs* v. *Lewis*, S. J. C. Suffolk, 1853.

A debtor's certificate does not discharge him from any debt which, in its nature or for any other cause, was not provable under the proceedings in which such discharge was granted. It does not discharge him from contingent debts which do not become absolute before the making of the first dividend, they not being otherwise provable under the proceedings A debt payable in work, being provable against the estate of an insolvent debtor, his certificate discharges him from such debt, though not proved against his estate. *Barker* v. *Mann*, 4 Met. 302.

A judgment recovered after the first publication of notice of proceedings in insolvency of the defendant, in an action pending at that time, is not provable in insolvency, and is not barred by the debtor's discharge. *Sampson* v. *Clark*, 2 Cush. 173; *Woodbury* v. *Perkins*, 5 Cush. 86; *Faxon* v. *Baxter*, S. J. C. Suffolk, 1853.

Pending a reference under a rule of court, the defendant became insolvent under the act, and the referees made their report after the first publication of notice. It was held that the award was not affected by the proceedings in insolvency. *Mann* v. *Houghton*, 7 or 8 Cush., 4 Law Reporter, N. S. 388, S. J. C. Worcester, 1851.

A discharge in bankruptcy, taking effect June 28, is not a bar to a claim for rent falling due July 9th following. *Savory* v. *Stocking*, 4 Cush. 607.

A certificate obtained by a debtor in proceedings instituted since the repeal of the United States bankrupt law of 1841, discharges him from debts arising on contracts made during the suspension of the insolvent law. *Austin* v. *Caverley*, 10 Met. 332; *Whiting* v. *Lewis*, 9 Law Reporter, 181; *Ward* v. *Proctor*, 7 Met. 318, 321.

(34) In the case of *Crosby* v. *Wentworth*, 7 Met. 10, it was held that a certificate of discharge obtained under the United States bankrupt law of 1841 does not bar a suit on the Revised Statutes, c. 104, § 4, to recover possession of lands or tenements wrongfully withheld from the owner.

The acceptor of a bill of exchange, drawn by a citizen of this Commonwealth in favor of a citizen thereof upon a British subject resident in England, accepted there and to be paid there, is discharged from liability thereon as such acceptor, in an action against him by the payee, by a discharge in bankruptcy subsequently obtained under the laws of England; and it is immaterial in this respect whether the bill was proved under the commission against the estate of the acceptor or not. *May* v. *Breed*, 7 Cush. 15.

(35) But an officer who holds an execution in the common form, issued by a court having jurisdiction, against a defendant who has been discharged under the insolvent laws, after the judgment on which the execution issued was rendered, is not liable to an action of trespass for arresting and committing such defendant on the execution, although the defendant shows his certificate to the officer before he is arrested. For it may be that the debt on which the judgment was rendered is not within the operation of the certificate, or the certificate may be void for fraud of the debtor, and the officer is not required to try all such questions that may arise before he may execute his precept. *Wilmarth* v. *Burt*, 7 Met. 257.

The question, whether a debt claimed by an officer under an execution is discharged by a certificate, cannot be tried in an action against the officer; the debtor should satisfy the execution and contest the question with the plaintiff in execution. *Aldrich* v. *Aldrich*, 8 Met. 102.

If the defendant in execution has any remedy, it is by applying for his discharge out of custody, or by *audita querela*, or by an action on the case against the party who thus wrongfully armed the officer with power to arrest him, upon the ground of its being on his part a malicious arrest. *Wilmarth* v. *Burt*, 7 Met. 257, 260; *Aldrich* v. *Aldrich*, 8 Met. 102.

This provision embraces a case where the debt, on account of which the debtor is imprisoned, accrued before the insolvent law was passed. Such cases are not within the saving clause of the twenty-fifth section. 1 Law Reporter, 273.

A certificate of discharge is not conclusive of the facts therein stated; but when offered in evidence, the court may go behind it and look into

the record of the proceedings to determine whether it was properly granted. *Gardner* v. *Nute*, 2 Cush. 333. And where it did not appear by the record that the insolvent had taken the oath prescribed by statute, and no oath was on file in the case, it was held that this overthrew the *primâ facie* evidence of the certificate. *Cox* v. *Austin*, S. J. C. Suffolk, 1853.

If a certificate of discharge is pleaded to an action to which it is not a bar, with the view of limiting the execution to the goods and estate of the defendant, and the validity of the discharge is denied by the plaintiff, this raises a question of fact to be tried by the jury, and not by the court. *Downs* v. *Lewis*, S. J. C. Suffolk, 1853.

(36) The words "since the passing of the act aforesaid," wherever they occur in the form of the certificate prescribed by the statute, should be "since the act aforesaid went into operation," to correspond with the provisions of the statute, which determine the effect of the certificate.

(37) By the third section of the statute of 1844, c. 178, every certificate must contain a statement of all fiduciary debts of the debtor to be exempted from its operation.

(38) It seems that this proviso was repealed by the statute of 1844, c. 178, § 4, by which a debtor cannot apply for his discharge until after a lapse of six months from the date of the assignment. *Rice* v. *Wallace*, 7 Met. 431; *Ex parte Bartlett*, 8 Met. 72.

In order that a dissent and objection of creditors, under this proviso, might be sufficient to prevent the debtor from receiving his certificate of discharge, it was necessary that one half in number or value of all the creditors who had proved their debts at any time before the close of their second meeting should signify such dissent, including as well those creditors who had proved at such meeting, when held by adjournment, as those who had proved their debts on or before the first day of their second meeting. *Rice* v. *Wallace*, 7 Met. 431.

By the act of 1844, c. 178, § 4, unless the assets of the debtor should pay fifty per cent. of the claims proved against him, he could not be discharged if a majority of the creditors who had proved their claims should dissent therefrom within six months from the date of the assignment. And by the act of 1848, c. 304, § 9, the debtor in such case cannot obtain his discharge unless a majority in number and value of his creditors who have proved their claims assent thereto.

(39) A distinct and unequivocal promise by the maker of a negotiable promissory note which is barred by a discharge in bankruptcy, to pay the same to the payee, is a promise to pay him or his order or bearer, and binding on the promisor, according to the tenor of the note, although not founded on any new consideration, and not expressed in writing. *Way* v. *Sperry*, 6 Cush. 238. Contra in Maine. *Wardwell* v. *Foster*, 31 Maine, 558; 5 Law Reporter, N. S. 566.

Payment of interest on a note barred by the maker's discharge will not revive his liability to pay the note. *Cambridge Savings Institution* v. *Littlefield*, 6 Cush. 210.

A mortgagor who has been discharged in bankruptcy is not estopped to set up his discharge in an action on the mortgage debt, by being present when the mortgagee assigns the note and mortgage to secure a loan to himself, without disclosing the fact that he has been so discharged. *Cambridge Savings Institution* v. *Littlefield*, 6 Cush. 210.

In an action against a debtor who has obtained his certificate of discharge in insolvency, to recover a debt barred by the certificate on the ground of a new promise by him to pay the debt, the plaintiff must prove a distinct and unequivocal promise to pay it; the mere fact that the debtor, since his discharge, has paid a part of the debt and indorsed the amount paid in his own hand on the note, is not sufficient to authorize a jury to infer that he made a distinct and unequivocal promise to pay the rest of it. *Merriam* v. *Bayley*, 1 Cush. 77.

A discharged debtor, being requested by the agent of a creditor "to put the old note in such a shape that she might get it at some time," declined to give a new note, but said that "he had always said and still said that the creditor should have her pay." This was held a sufficient promise to avoid the bar of the certificate. *Pratt* v. *Russell*, 7 Cush., 4 Law Reporter, N. S. 330, S. J. C. Berkshire, 1851.

A promise by a debtor after he has been decreed a bankrupt and before he has obtained a discharge is not barred by the discharge. *Otis* v. *Gazlin*, 31 Maine, 567; 4 Law Reporter, N. S. 566.

Creditors in the sum of three hundred dollars of a discharged insolvent entered into a new contract with the debtor, by which he was to build a house for the creditors for the sum of one thousand dollars, seven hundred thereof to be paid in cash and the remaining three hundred to be indorsed on the note barred by the debtor's discharge. It was held that this was not sufficient to avoid the bar of the certificate. In such case a judgment recovered by the debtor on the new special building contract is a bar to an action on the note against him; and his agreement, that three hundred dollars of his judgment might remain unpaid, to await the result of the suit against him on the note, is not an admission of his liability. *Kelley* v. *Pike*, 5 Cush. 484.

Where the maker of a promissory note payable to two payees jointly, after his discharge in insolvency made a note to each of the payees for one half of the amount of the joint note, but bearing the same date, and received the latter in exchange, it was held that, if the joint note was a subsisting and valid note at the time, an action would lie on both notes, notwithstanding such discharge. *Williams* v. *Bugbee*, 6 Cush. 418.

A defendant who was defaulted obtained a writ of review and *supersc-*

deas, and afterwards applied for the benefit of the insolvent law and obtained his discharge. On the trial of the writ of review, the plaintiff therein waived all other defence to the original action, and set up his certificate of discharge; but it was held that he could not thus avail himself of his discharge, the question upon review being whether the original judgment was right, and the certificate having no tendency to show that it was wrong. *Foster* v. *Plummer*, 3 Cush. 381.

Of Appeal, when a Discharge is refused. — Allowance to the Debtor.

Sec. 8. In case the judge of probate shall not see cause to grant such certificate, or if the granting thereof shall be prevented by the objection of the creditors as above provided, the debtor may appeal (40) to the Supreme Judicial Court which shall be first held within and for the same county, next after the expiration of fourteen days from the time of claiming the appeal, (41) provided that such appeal be claimed, and notice thereof given to the said judge or his clerk, to be entered upon the record of the proceedings, within ten days after the decision appealed from. And the said appeal may be heard and determined by the said Supreme Judicial Court, whether held by one justice thereof, or by three or more of the said justices; and any of the said creditors may appear and object to the allowance of the certificate; and if, after a full hearing of all the parties, it shall appear, to the satisfaction of the said court, that the debtor has made a full disclosure and delivery of all his estate, as herein above required, and that he has in all things conformed himself to the directions of this act, the court shall cause a certificate thereof, in substance like that prescribed in the preceding section, to be made under the seal of the court, and signed by the clerk thereof, and to be delivered to said debtor; which certificate shall have the same force and effect as herein provided with regard to the said certificate when granted by the judge of probate. And every debtor so discharged

shall be allowed five per cent. on the net produce of all his estate that shall be received by the assignees, in case such net produce, after such allowance made, shall be sufficient to pay the creditors entitled to a dividend the amount of fifty per cent. on their debts respectively; and so as the said allowance shall not exceed, in the whole, the sum of five hundred dollars. (42)

(40) By the act of 1848, c. 304, § 11, the assignee may appeal from a decision granting a certificate.

(41) If an appeal, regularly taken, be not entered at the next term of the Supreme Judicial Court, it cannot be entered at any subsequent term. *Ex parte Decoster*, 7 Law Reporter, 189.

(42) Partners became insolvent under this act. The partnership property was not sufficient to pay fifty cents in a dollar of their joint debts, but the separate estate of one of the partners paid fifty-five per cent. of his separate debts, and it was held that he was entitled to receive five per cent. of the net proceeds of his separate estate, and to be discharged from his separate debts, but that the proceedings against him as copartner were not affected thereby. *Baker, Appellant*, 7 or 8 Cush., 4 Law Reporter, N. S. 388, S. J. C. Worcester, 1851.

Examination of the Debtor where he is sick or imprisoned.

SEC. 9. If the debtor shall be in prison, either on mesne process or in execution, in any suit or proceeding for or on account of any debt or demand whatever that is provable against his estate, at any time before the granting of his certificate, and when his attendance may be required before the judge or the assignees, or at any meeting of his creditors, as provided in this act, the said judge may, in his discretion, by warrant under his hand and seal, require the prison-keeper to produce the debtor for the purposes aforesaid, at such time and place as may be specified in the warrant; and in case the debtor shall, by reason of imprisonment or sickness, or any other cause which shall be deemed sufficient by the judge, be unable to attend before the judge, or the assignees, or at any

meeting of his creditors, as provided in this act, then the said judge, or some person to be deputed by him for that purpose, and the assignees, or some person appointed by them, shall attend the debtor in prison or elsewhere, if he be within this Commonwealth, in order to take his examination; and the examination thus taken shall be of the same force and effect as if the debtor had attended in person before the judge or the assignees, or at the meetings aforesaid, and had there undergone the same examination. And if the debtor shall be without this Commonwealth, and shall be unable to return and give his personal attendance at any of the times and for the purposes in this act above specified, and if it shall appear that such absence was not caused by any wilful default of the debtor, and if he shall, as soon as may be after the removal of such impediment, offer to attend and submit to an examination on oath before the judge and the assignees, as herein before provided, and shall do and perform all things by this act required for the purpose of obtaining his certificate, he shall be entitled thereto in like manner as if he had done all the same things at the times respectively first above prescribed. And if the debtor shall, at the time of obtaining his certificate, be in prison for any cause before mentioned in this section, he shall be discharged from such imprisonment upon producing to the prison-keeper his certificate granted pursuant to the provisions of this act.

Of Frauds.

Sec. 10. Every certificate of discharge granted to a debtor under this act shall be of no effect, if he shall have wilfully sworn falsely as to any material fact in the course of the proceedings under this act; or if he shall have fraudulently concealed any part of his estate or effects, or any books or writings relating thereto; (43) or if, after this

act shall go into operation, he shall, in contemplation of his becoming insolvent, and of obtaining a discharge under the provisions of this act, make any payment, or any assignment, sale, or transfer, either absolute or conditional, of any part of his estate, with a view to give a preference to any creditor, or to any person who is or may be liable as an indorser or surety for such debtor, or to any other person who has or may have any claim or demand against him: (44) *provided*, that this clause shall not apply to any security given for the performance of any contract, when the agreement for such security is part of the original contract, and the security is given at the time of making such contract. And all such payments, assignments, sales, and transfers shall, as to the other creditors of such debtor, be void, in like manner, and to the same effect, as conveyances made by any debtor to the intent or whereby his creditors may be delayed, hindered, or defrauded, are now by law void as to such creditors; and the assignees shall and may, by an action in their own names, recover from the creditor so preferred the money or other things so paid, assigned, sold, or transferred to him, or the value thereof, for the use of the other creditors. (45) And the creditor so preferred, if he shall have accepted such payment or security, knowing that the same was made or given by the debtor contrary to the provisions of this section, shall not be allowed to prove the debt on account of which such payment or security was made or given, nor to receive any dividend therefor out of the estate assigned by force of this act. (46)

(43) The mere omission to disclose property by a debtor will not avoid his discharge, under the tenth section of the act of 1838; to have this effect, there must be a fraudulent concealment or omission. *Atkins* v. *Spear*, 8 Met. 490; *Robinson* v. *Wadsworth*, 8 Met. 67.

(44) The words "in contemplation of becoming insolvent," in the statutes, refer to an act done with the intent to contravene the insolvent laws; and such intent cannot be inferred from the fact of the actual insolvency of

the debtor at the time of the act done, though he knew that he was then insolvent; to be in fraud of the law, the act must be done with intent to take the benefit of it. *Jones* v. *Howland*, 8 Met. 377.

Where a plaintiff, for the purpose of avoiding a discharge of the defendant under the insolvent law, relied on by him as a bar to the plaintiff's action, introduces a witness who testifies that the defendant, on the evening before he applied for the benefit of the law, transferred property to the witness in payment of a preëxisting debt, the defendant is entitled to prove, on cross-examination, the declarations made by him to the witness at the time of such transfer, for the purpose of showing that it was not made in contemplation of becoming insolvent and obtaining a discharge under that law. *Goodhue* v. *Hitchcock*, 8 Met. 62.

In that case, the certificate of discharge, the validity of which was brought in question, was granted before the statute of 1841, c. 124, was passed. By the third section of that statute, and the eighth section of the statute of 1844, c. 178, new provisions upon the subject of this section of the statute of 1838 are made, changing, to a considerable extent, the effect of a transfer of property to a preëxisting creditor upon the validity of the discharge, and of the transfer itself as against other creditors.

It seems that a conveyance made by a debtor, being in fact insolvent, and knowing himself to be so, for the purpose of preferring a creditor, would not avoid a discharge obtained by him before the statute of 1841 went into operation, unless such conveyance was made by him in contemplation of becoming insolvent, and obtaining his discharge under the insolvent law. And the burden is upon the party attempting to avoid a discharge to show that fact. *Eastman* v. *Eveleth*, 4 Met. 137; *Gorham* v. *Stearns*, 1 Met. 366; *Goodhue* v. *Hitchcock*, 8 Met. 62.

By the act of 1841, c. 124, § 3, the burden is cast upon the debtor, to show that at the time of making any such conveyance he had reasonable cause to believe himself solvent. *Ex parte Jordan*, 9 Met. 292, 296. See notes to that act, and to § 9 of the act of 1844, c. 178.

An assignment at common law, made by a debtor, during the suspension of the insolvent laws, of his property to assignees, to be distributed *pro ratâ* among all his creditors who should execute the assignment, is not a preference which will avoid a discharge obtained under the insolvent laws, after they became again in force; nor is a payment of money to a creditor to induce him to execute such assignment; nor a payment made under the compulsion of legal process. *Atkins* v. *Spear*, 8 Met. 490.

Where a bankrupt under the laws of the United States, paid money to a creditor to induce him not to oppose his obtaining his discharge, (the bankrupt knowing that the creditor was able to prove facts sufficient to prevent him from obtaining his discharge,) and the creditor thereupon

withdrew his opposition, and the bankrupt obtained his discharge; it was held, that this was sufficient to avoid such discharge under the fourth section of the bankrupt act of 1841. *Coates* v. *Bush*, 1 Cush. 564.

A discharge under the bankrupt law of 1841 may be impeached by showing preferences made by the bankrupt after the passage of the act and before it went into operation. *Swan* v. *Littlefield*, 4 Cush. 574.

A creditor is not estopped to deny the validity of his debtor's discharge, and to avoid the same, on any grounds upon which the law provides it shall be of no effect, by reason of having proved his debt in the proceedings in insolvency, and received a dividend thereon from the assets of the debtor. *Morse* v. *Reed*, 13 Met. 62. So, though the granting of the discharge was opposed by creditors, it may be contested when pleaded, and on the same ground that the granting of it was opposed. *Williams* v. *Coggshall*, 8 Cush., S. J. C. Bristol, 1851.

Under the rules of practice adopted by the Court of Common Pleas, where the defendant, in his specification of defence, relies on a certificate of discharge under the insolvent law, and the plaintiff admits the discharge, but denies its validity, on the ground of fraud committed by the defendant, the plaintiff has the right to open and close, for the burden is upon him to prove the alleged fraud. *Robinson* v. *Hitchcock*, 8 Met. 64.

(45) A payment or assignment by a debtor to one of his creditors was not void under this section as to his other creditors, unless it was made by the debtor in contemplation of becoming insolvent and obtaining his discharge under the insolvent law. It did not affect the validity of the transaction, that the debtor was, in fact, insolvent at the time. And in an action by an assignee to recover property transferred by the insolvent, the burden was upon the plaintiff to show that the transfer was made by the debtor in contemplation of becoming insolvent and obtaining his discharge under the statute. *Gorham* v. *Stearns*, 1 Met. 366; *Eastman* v. *Eveleth*, 4 Met. 137. See act of 1841, c. 124 and notes.

In the case of *Gorham* v. *Stearns*, a debtor, being in fact insolvent, and the whole of his stock in trade being under attachment at the suit of several of his creditors, assigned to another creditor choses in action to secure him what he owed him, as also to indemnify him for certain liabilities incurred on the debtor's behalf; but not intending to take the benefit of the insolvent act, and not, in fact, knowing that there was such a statute. The next day the debtor made application for the benefit of the insolvent law; and it was held that the assignment of such choses in action was valid as against other creditors and the assignee appointed in the proceedings in insolvency.

So, an agreement made by a debtor whose property was attached by several creditors, that judgment should be rendered against him in favor of the first attaching creditor, on the first day of the term to which the sev-

eral writs were returnable, was not void by the statute of 1838, as against his other creditors, though the first attaching creditor's demand was greater than the value of all the property attached; unless such agreement was made by the debtor in contemplation of becoming insolvent and obtaining his discharge under that statute. *Eastman* v. *Eveleth*, 4 Met. 137.

The assignee may affirm a sale made by an insolvent for the purpose of delaying and defrauding creditors, and receive the price of the goods of the vendee. And an action brought by such assignee, with a full knowledge of all the facts in the case, to recover the price of such goods, other goods of the defendant being attached to secure the same, is an affirmance of the sale, and a waiver of all right to disaffirm it and claim the goods themselves, or the value of the goods, in an action of trover. *Butler* v. *Hildreth*, 5 Met. 49; *Perkins* v. *Webster*, 2 Cush. 480.

But the case might be different, if, after the action to recover the price is commenced, facts come to the knowledge of the assignee which would have led him to a different election, whether the facts relate to the character of the sale, as to the question of fraud, or whether they relate to the remedy; as if the assignee, after bringing suit for the price, and attaching property to secure the amount, discover that the property attached does not belong to the defendant; or if he discover that the defendant has an off-set which would be good against assumpsit for the price, but not good against an action of trover. *Butler* v. *Hildreth*, 5 Met. 49, 51.

If one of the purposes of a mortgagor and mortgagee is to deter the creditors of the mortgagor from attaching the mortgaged property, the mortgage is wholly void as to those creditors, although the principal purpose of the parties is to secure a *bonâ fide* debt of the mortgagor. *Crowninshield* v. *Kittridge*, 7 Met. 520.

If a mortgage of goods, fraudulent and void as to creditors, be made for the purpose of securing the payment of a debt due from the mortgagor to a stranger to the mortgage, and the mortgagee sell the goods and pay such debt with the proceeds, this is equivalent to a restoration of the goods to the mortgagor, and purges the fraud of the transaction. *Crowninshield* v. *Kittridge*, 7 Met. 520. See also *Thomas* v. *Goodwin*, 12 Mass. 140; *Oriental Bank* v. *Haskins*, 3 Met. 332.

Where a mortgage of personal property was made by A to B, fraudulent and void as to A's creditors, to secure payment, in six months, of a debt of A, then due and payable to C, who had no knowledge of the mortgage when it was made, and B, before the six months elapsed, sold the property at auction and applied the proceeds of the sale to the payment of A's debt to C, and A afterwards applied for the benefit of the insolvent law, and his property was assigned under that act, it was held that his assignee could not recover of B the proceeds of said mortgaged property. *Crowninshield* v. *Kittridge*, 7 Met. 520.

A mortgage of personal property void in part, as being in contravention of the insolvent law, is wholly void. *Denny* v. *Dana*, 2 Cush. 160.

The provisions of the insolvent laws, that a debtor's conveyance of his property in contemplation of insolvency, with intent to give a preference to any creditor, shall be void as to his other creditors, and that his assignees may recover the property so conveyed, or the value thereof, from the creditor so preferred, for the benefit of the other creditors, has not so altered the common law respecting fraudulent conveyances as to render such conveyance void as to an attaching creditor. *Penniman* v. *Cole*, 8 Met. 496.

Where the holder of a promissory note signed by one who afterwards became insolvent, and indorsed by persons of undoubted credit, received of the debtor, in part payment of, and as a substitute for, such note, when the same became due, other good notes and money; it was held that such payment and substitution were not an unlawful preference within this statute, so as to render the creditor liable therefor in an action by the assignee of his debtor. *Stevens* v. *Blanchard*, 3 Cush. 169.

In an action brought by the assignees of an insolvent debtor, to try the validity of a sale of chattels made by him shortly before proceedings in insolvency were instituted against him, he is a competent witness for the purchaser, to prove that the sale was not made for such purpose, or with such intent and knowledge as rendered it void against his creditors. *Clark* v. *Gordon*, 13 Met. 434.

Duties of Assignees. — Their Removal.

Sec. 11. The assignees (46) shall forthwith cause the said assignment to be recorded in the registry of deeds in each county in the Commonwealth in which there may be any real estate of the debtor on which the same may operate; and shall also give public notice of their appointment, in such manner as the judge shall order; (47) and shall demand and receive from the messenger, and from all other persons, all the estate in his or their possession respectively, which shall have been assigned, or intended to be assigned, according to the provisions of this act; and they shall sell all the said estate, real and personal, which shall come to their hands, on such terms as they shall think most for the interest of the creditors; and shall keep a regular account of all moneys received by them as as-

signees, to which every creditor shall at all reasonable times have free resort. (48) And the assignees shall, as soon as may be, after receiving any moneys belonging to the estate, deposit the same in some bank, in their names as assignees, or otherwise keep the same distinct and apart from all other moneys in their possession; and they shall likewise, as far as practicable, keep all the goods and effects belonging to the estate separate and apart from all other goods in their possession, or designated by appropriate marks; so that all such moneys, goods, and effects, belonging to the estate, may be easily and clearly distinguished from other like things in the possession of the assignees, and may not be exposed or liable to be taken as their property, or for the payment of their debts. And they shall be allowed and retain out of the moneys in their hands all the necessary disbursements made by them in the discharge of their duty, and a reasonable compensation for their services, at the discretion of the judge. And the assignees shall have power, under the direction of the judge, to submit any controversy that shall arise in the settlement of any demands against the estate of the debtor, or of debts due to his estate, to the determination of one or more arbitrators, to be chosen by the assignees and the other party to such controversy; and the assignees shall likewise have power, under the direction of the judge, to compound and settle any such controversy by agreement with the other party thereto, as they shall think proper, and most for the interest of the creditors. And it shall be in the power of the creditors, by such a vote as is provided in the second section of this act for the choice of assignees, at any regular meeting called by order of the judge for that purpose, which meeting may be called by the judge at his discretion, and shall be called by him upon the application of a majority of said creditors, either in number or value, to remove all or any of the assignees; (49) and upon such removal, or upon any va-

cancy by death or otherwise, to choose one or more assignees in his or their place; and all the estate of the debtor, not before lawfully disposed of, shall be forthwith as effectually and legally vested in such new assignee or assignees, as if the original assignment had been made to him or them; and the former assignee or assignees, and his or their executors or administrators, shall, upon the request and at the expense of the estate in the hands of the new assignee or assignees, make and execute to him or them all such deeds, conveyances, and assurances, and do all such other lawful acts and things, as may be needful or proper to enable the new assignee or assignees to demand, recover, and receive all the said estate. And when only one assignee shall be originally appointed, or when, by death or otherwise, the number shall be reduced to one, all the provisions in this act contained in reference to several assignees shall apply to such one. (50)

(46) The eleventh section of the statute of 1844, c. 178, provides that the assignees, before entering upon the discharge of their duties, shall give bond for the faithful performance of such duties, when required so to do, by a majority in value of the creditors who have proved their claims. By the act of 1848, c. 304, § 12, the commissioner may require the assignee to give bond in all cases. And by the act of 1853, c. 116, an assignee is required to give bond whenever any creditor who shall have proved his claim shall, in writing filed with the commissioner, so request.

(47) As to mode of giving notice, see act of 1851, c. 138.

(48) See act of 1848, c. 304, § 12, as to the concealment of property by the assignee.

(49) Where an assignee removes from the Commonwealth, he may be removed from office by the commissioner. Act of 1851, c. 349, § 2.

Where an assignee had exercised undue influence in procuring his appointment as assignee, and his interests were adverse to those of the other creditors, and he had used improper means since his appointment to secure a preference to himself for his claims against the insolvent debtor, the court ordered that he should be removed; that his assignment should be revoked; that the master in chancery should call a meeting of the creditors, to choose another assignee; and that the former assignee should make to the new assignee all necessary conveyances. *Shelton* v. *Walker*, 10 Law Reporter, 124, S. J. C. Suffolk, 1847.

A creditor whose claim has been allowed by the commissioner, from whose allowance the assignee has taken an appeal, cannot vote or act in the removal of the assignee, or in the choice of a new one; and if he does, all proceedings affected by his vote will be vacated. *In the Matter of Macy.* 5 Law Reporter, N. S. 21, S. J. C. Suffolk, 1852. But see the act of 1852, c. 293, by which the effect of this decision is somewhat modified.

(50) As to how far an assignee is liable individually upon any special promise, see act of 1848, c. 252.

Third Meeting. — Assignee's Account. — Dividend.

Sec. 12. The assignees shall, at such time as shall be appointed by the judge, within six months from the time of their appointment, call a meeting (51) of all the creditors of the debtor, by a notice to be published in such manner as the judge shall direct, (52) at which meeting the creditors who have not before proved their debts shall be allowed to prove the same; and the assignees shall produce to the judge and the creditors then present fair and just accounts of all their receipts and payments touching the estate of the debtor, and shall, if required by the judge, be examined on oath as to the truth of such accounts; (53) and the said judge shall thereupon make an order in writing under his hand, for a dividend of the said estate and effects, or of such part thereof as he shall think fit, among such of the creditors of the said debtor as shall have proved their debts, in proportion to their respective debts, which order shall be recorded with the other proceedings in the case. (54) *Provided, however*, that all debts due by the debtor to the United States, or to any persons who, by the laws of the United States, or of this Commonwealth, are or may be entitled to a priority or preference with respect to such debts out of the estate assigned as aforesaid, shall have the benefit of such priority or preference in like manner as if this act had not been passed. (55) And if, at the time of ordering such dividend, it shall appear to the judge probable that there are just claims against the

estate, which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, the judge shall, in ordering such a dividend, leave in the hands of the assignees a sum sufficient to pay to every such absent creditor a proportion equal to what shall be then paid to the other creditors, which sum shall remain thus unappropriated in the hands of the assignees, until the final dividend shall be declared, or until the judge shall order its distribution.

(51) The act of 1844, c. 178, did not repeal this provision, and if the third meeting be not held within six months from the date of the assignment, the debtor's discharge will not be valid against creditors who have not proved their claims. *Sanderson* v. *Taylor*, 1 Cush. 87; *Williams* v. *Robinson*, 4 Cush. 529; *Crocker* v. *Stone*, 7 Cush., S. J. C. Suffolk, 1851.

(52) As to notices to be given by the assignees, see acts of 1846, c. 168, § 4; 1850, c. 319; 1851, c. 138 and 307; 1852, c. 185.

(53) By the seventh section of the statute of 1844, c. 178, further provisions are made relative to the time when assignees shall render their accounts.

(54) An order of distribution has no binding effect, so as to prevent the judge of probate or master in chancery from modifying it, as justice and the true construction of the statute may require, at any time before the same is delivered over to the assignee, although the meeting at which it was made has been closed; as if the judge or master, after a dividend has been made up, but before the order of distribution has been delivered to the assignee, or any payments made under it, learn that there is a just claim against the estate of the insolvent, which, through mistake or accident, was omitted to be proved, he is bound to permit the creditor to prove the same and come in with the other creditors; or so to modify his order of distribution as to leave a sufficient sum in the hands of the assignee to pay such creditor a proportionate dividend. *Fletcher* v. *Davis*, 7 Law Reporter, 142.

(55) By the sixth section of the statute of 1841, c. 124, if an attachment on mesne process be dissolved by proceedings under this act, the legal costs in the suit are made a privileged debt, provided the debt on which the suit was founded be proved.

By the act of 1850, c. 218, taxes not due to the Commonwealth are not privileged.

Sales of Property and Debts. — Second and Final Dividends. — Surplus.

Sec. 13. The said assignees shall, at such time as shall be appointed by the judge, within eighteen months after the appointment of the assignees, make a second dividend of the said estate, in case the same was not wholly distributed upon the first dividend, and shall give notice of a meeting for that purpose of all the creditors of the debtor in such manner as the judge shall direct; at which meeting the creditors who have not before proved their debts shall be allowed to prove the same; and the accounts of the assignees shall then be produced and examined, as provided in the preceding section, and shall be settled by the judge; and what, upon the balance thereof, shall appear to be in their hands shall, by a like order of the judge, be divided among all the creditors who shall then have proved their debts, in proportion to their respective debts: *provided*, that no creditor, whose debt shall be proved at the time of the second or any after dividend, shall be allowed to disturb any prior dividend; but he shall be paid so far only as the funds remaining unappropriated in the hands of the assignees shall be sufficient therefor. And if, at the time of appointing the meeting for the said second dividend, there shall remain in the hands of the assignees any outstanding debts or other property due or belonging to the estate, which cannot, in the opinion of the judge, be collected and received by the assignees without unreasonable or inconvenient delay, the assignees may, under the direction of the judge, sell and assign such debts or other property in such manner as shall be ordered by the judge. And such second dividend shall be final, unless any suit relating to the estate be then depending, or any part of the estate be outstanding, or unless some other estate or effects of the said debtor shall afterwards come to the hands of the assignees, in which cases another div-

idend shall be made, by the order of the judge, in the manner before provided; and further dividends shall be made in like manner as often as occasion shall require; and at every regular meeting of the creditors, those who have not before proved their debts shall be allowed to prove the same. (56) And if, after the payment of all debts proved as aforesaid, any surplus shall remain in the hands of the assignees, the same shall be paid or reconveyed to, or revest in, the debtor or his legal representatives. (57)

(56) It is not necessary that claims against the estate of an insolvent should be proved at one of the first four meetings of the creditors; they may be proved at any subsequent meeting regularly held. *Minot* v. *Thacher*, 7 Met. 348.

(57) The word "debts" is used in this statute in its broadest sense, and includes, not only the amount of principal and interest allowed as due at the time of the first publication of notice, but also all interest allowed by law at the time of the final order of distribution, as well upon claims not bearing interest upon the face of them as upon those which do. *Brown* v. *Lamb*, 6 Met. 203. The rule established in that case is, that if a surplus remains in the hands of the assignees after payment of all debts proved, as the statute requires, they are to pay interest on such debts as follows: On all debts where interest is reserved by the contract, interest is to be paid according to the contract; on all debts where interest is not reserved by the contract, if the debts became due before the first publication of the warrant to the messenger, interest is to be paid from the time of such publication; but if the debts became due after such publication, interest is to be paid from the maturity of the debt; and if the debts were payable on demand, their interest is to be paid from the earliest demand shown; and if no special demand be shown, then interest is to be paid from the time of such first publication. And when an appeal is taken from the order of a master, directing interest to be so paid, and the order is confirmed, the interest is to be paid up to the time of the final order of the appellate court.

An assignee is not liable to the trustee process as trustee of a creditor of the insolvent. *Colby* v. *Coates*, 6 Cush. 558.

Of the Clerk and Record.

SEC. 14. The judge, at the commencement of the proceedings in each case under this act, shall appoint a clerk, who shall be sworn to the faithful discharge of his duty; (58) and the clerk shall keep a record of all the regular meetings of the creditors, and of all the proceedings thereat, and shall preserve all papers duly filed in the course of the proceedings, and perform such other duties appertaining to his office as shall be prescribed by the judge. (59) And the record of the proceedings in each case, with all the papers filed therein, shall be inclosed together, and at the termination of the proceedings shall be deposited in the probate office of the county, and be there preserved under the care of the register of probate. (60) And the judge may remove the clerk for any cause that he shall deem sufficient; and upon such removal, or upon the death, resignation, or absence of the clerk, may appoint another in his place. And the certificate of discharge, when granted by the judge, shall be recorded at length by the clerk with the other proceedings; and copies of all parts of the said record, duly certified by the register of probate, shall in all cases be admissible as evidence, *primâ facie*, of the facts therein stated and contained. (61)

(58) A clerk cannot act as counsel or attorney in the case in which he is clerk. Act of 1852, c. 291, §§ 2, 4.

(59) If the petition by or against a debtor be not granted, the judge or master to whom the application is made is not required to make a record of his proceedings. His duty is performed by filing the petition. A record becomes necessary only when the application is granted, a clerk appointed, and further proceedings had. *Randall* v. *Barton*, 6 Met. 518.

(60) As to what papers may be withdrawn from the file, and how, see the act of 1852, c. 189, § 3.

(61) The record is conclusive evidence of the time when a decree was rendered. *Leigh* v. *Arnold*, 5 Cush. 615.

The original papers and record of proceedings in insolvency deposited

in the probate office, and produced by the register of probate, are admissible in evidence equally with certified copies thereof, under this section. *Odiorne* v. *Bacon*, 6 Cush. 185.

A discharge in insolvency may be proved by the original certificate, as well as by a certified copy of the record. *Greene* v. *Durfee*, 6 Cush. 362.

Judge to preside at Meetings.— Proof by Attorney.

SEC. 15. The judge shall attend and preside at all meetings of the creditors, and shall regulate the proceedings thereat; and he may adjourn any meeting from time to time as occasion shall require, and all things lawfully done at any such adjourned meeting shall be of the like force and effect as if done at the original meeting. (62) He shall also have the power to administer all oaths that shall be required in the course of the proceedings. And if any creditor, who shall reside more than ten miles from the place of meeting of the creditors, shall be required to make oath in support of his claim, such oath may be administered by any justice of the peace, or other person duly qualified to administer oaths, in the place or county where the debtor may be; and every creditor who has proved his debt may appear, vote, and act, at all meetings of the creditors, by his attorney duly constituted, in like manner as if he were personally present.

(62) In the absence of the judge of probate or master in chancery, the clerk may adjourn a meeting. Acts of 1844, c. 178, § 16, and 1846, c. 168, § 2.

Where adjournments of a meeting are had, the original meeting and the adjournments constitute but one meeting; and acts done at the original meeting and at the adjournments have the same force and effect in themselves, and in relation to each other, that they would have if done on the same day and at the same session. *Rice* v. *Wallace*, 7 Met. 431.

This provision does not entitle a creditor whose claim has been proved at an adjournment of the third meeting, held after six months from the date of the appointment of the assignee, to dissent from the granting of a certificate to the insolvent, under the act of 1844, c. 178, § 4. *Revere* v. *Newell*, 4 Cush. 584.

Fees of Judge, Clerk, Messenger, and Witnesses.

SEC. 16. There shall be allowed and paid, out of the estate and effects of the debtor, the following fees for the respective services hereinafter mentioned; that is to say:

To the judge, for receiving and allowing the original petition, and issuing his warrant thereon, five dollars; (63) and the same sum for every day which he may be employed in this duty, to be apportioned among the several causes, if there be more than one, on which he may act on the same day.

To the clerk, for every day's attendance upon or with the judge, on any business arising in such causes, a sum not exceeding two dollars per day, to be apportioned as aforesaid; and such further compensation for keeping a record of the proceedings, and for any other services performed by him, as the judge shall allow.

To the messenger, such compensation as the judge shall see fit to allow, according to the circumstances of each case; regard being had to fees allowed to sheriffs for like services.

To every witness the same fees as are or may be allowed to witnesses in the Court of Common Pleas.

(63) By the act of 1844, c. 178, § 14, the judge or master is to be paid only two dollars for allowing the petition and issuing the warrant.

As to travelling fees of commissioners of insolvency, see act of 1848, c. 304, § 7. As to his duty to account to the Commonwealth for his fees, see acts of 1848, c. 304, § 5, and 1851, c. 349, § 3.

Jurisdiction of Masters in Chancery. — Provision in Case the Judge or Master is absent from a Meeting. — Not to act as Counsel.

SEC. 17. Every master in chancery, in the county for which he is appointed, shall have and exercise all the ju-

risdiction, power, and authority herein before given to the several judges of probate for the respective counties; and all the provisions in this act contained, in reference to the said judges of probate, shall apply to the said masters in chancery respectively, in like manner as if they had been in every instance specially mentioned. And in case the judge of probate, or any master in chancery, before whom any proceedings under this act may be pending, shall die, or shall from any cause be absent or unable at any time to attend and perform any of the duties required of him, the same duties shall and may be performed by any other of the said officers, in like manner as if the proceedings had been commenced before him. (64) And no judge of probate, master in chancery, or either of said officers, shall in any way be the counsel or attorney of any party, in relation to any matters connected with the proceedings under any assignments over which they may have exercised any of the powers given in this act.

(64) The act of 1844, c. 178, § 15, authorizes every judge and master to finish and close any case entered before him during his term of office, notwithstanding any limitation of his commission and powers, to the contrary.

Jurisdiction of the Supreme Judicial Court.

SEC. 18. The Supreme Judicial Court shall have a general superintendence and jurisdiction, as a court of chancery, of all cases arising under this act; and may, from time to time, make such general rules and forms as they shall judge necessary to establish and maintain a regular and uniform course of proceedings therein, in all the different counties; and they shall also have power, in all cases which are not herein otherwise specially provided for, upon the bill, petition, or other proper process of any party aggrieved by any proceedings under this act, to hear and determine the case, as a court of chancery, and to

make such order or decree therein as law and justice shall require; (65) and all the powers granted in this section may be exercised either by the said court at any law term thereof, or by any one justice thereof respectively, in like manner in all respects as other chancery powers vested in said court may by law be exercised, excepting the power of making general rules and forms as aforesaid, which latter power shall be exercised only at a law term of said court.

(65) This section confers on the Supreme Judicial Court jurisdiction and full powers of superintendence, as a court of chancery, of all cases arising under the statute, and full authority to act upon the petition of any party aggrieved by any of the proceedings under the same. And in a proper case, with proper parties, the court has power to arrest and supersede proceedings irregularly or illegally instituted or conducted, and may order an injunction as to any suits at law commenced by an assignee illegally appointed. *Partridge* v. *Hannum*, 2 Met. 569; *Wheelock* v. *Hastings*, 4 Met. 504; *Kimball* v. *Morris*, 2 Met. 573; *Claflin* v. *Beach*, 4 Met. 392.

Where, after an attachment made upon a *primâ facie* debt, involuntary proceedings in insolvency are instituted against the defendant, the attaching creditor is "a party aggrieved" by such proceedings, and may apply to the Supreme Court to have them superseded and vacated. *Penniman, Petitioner*, 5 Law Reporter, N. S. 28, before Dewey, J., Suffolk, 1852. See also *Stearns* v. *Kellogg*, 1 Cush. 449.

If there is no provision in the statute for an appeal from the decision of the judge of probate or master in chancery, upon a particular point, the remedy of the aggrieved party is by petition in the nature of an appeal to the Supreme Judicial Court. *Eastman* v. *Foster*, 8 Met. 19. There is no provision for an appeal from the decision of a judge of probate respecting the disposition of property; and the remedy of a party injured is by petition to the Supreme Court. *Eastman* v. *Foster*, 8 Met. 19.

The Supreme Court has no jurisdiction under this section, where an appeal is expressly given by the statute. *Palmer* v. *Dayton*, 4 Cush. 270. Its jurisdiction under this section is limited to cases not otherwise provided for by the statute. *Davis* v. *Newton*, 6 Met. 537, 543; *Harlow* v. *Tufts*, 4 Cush. 448, 452. And it has appellate jurisdiction of cases arising under the statute, only where it is expressly given. In all other cases the remedy under this section is by original proceeding. *Barnard* v. *Eaton*, 2 Cush. 294.

An application to the Supreme Judicial Court for the exercise of chancery powers must be by bill, petition, or other proceedings in chancery. In a writ of entry brought by the assignee of an insolvent debtor to try the title to land set off on an execution against the debtor, the rights of the parties are to be determined upon strict principles of law. *Cushing* v. *Arnold*, 9 Met. 23.

An assignee under the insolvent law may file a bill for discovery merely in aid of an action at law brought by him to recover property alleged to have been conveyed by the insolvent in fraud of the law. *Adams* v. *Porter*, 1 Cush. 170; *Thayer* v. *Smith*, 9 Met. 469; *Woodman* v. *Saltonstall*, 7 Cush., 4 Law Reporter, N. S. 35, Suffolk, 1851.

But a bill will not lie by the assignee to recover the property so fraudulently conveyed, although it contains a prayer for a discovery; the remedy at law being adequate. *Thayer* v. *Smith*, 9 Met. 469; *Woodman* v. *Saltonstall*, 7 Cush., 4 Law Reporter, N. S. 35, Suffolk, 1851.

The court have jurisdiction under this section to revise the proceedings of a commissioner of insolvency, under the first section of the act of 1846, c. 168, against persons charged with embezzling or disposing of the estate of an insolvent debtor. *Harlow* v. *Tufts*, 4 Cush. 448.

The Supreme Court may remove an assignee for sufficient cause. *Shelton* v. *Walker*, 10 Law Reporter, 124. See *ante*, § 11, note.

That court has jurisdiction under this section to grant relief in all cases arising under the statute, where the statute itself has not provided a specific mode of relief. *Wheelock* v. *Hastings*, 4 Met. 504; *Eastman* v. *Foster*, 8 Met. 19; *Barnard* v. *Eaton*, 2 Cush. 294; *Harlow* v. *Tufts*, 4 Cush. 448, 451.

It is no objection to a petition by creditors of an insolvent to the Supreme Court under this section, that the creditors have not proved debts in the insolvent proceedings. *Mass. Iron Co.* v. *Hooper*, 7 Cush., Suffolk, 1851.

Of Involuntary Proceedings.

Sec. 19. If any person, (66) arrested on mesne process in any civil action for the sum of one hundred dollars or upwards, founded upon a demand which in its nature is provable against the estate of an insolvent debtor according to the foregoing provisions of this act, shall not give bail therein on or before the return day of such process; or if any person shall be actually imprisoned for more than thirty days, either upon mesne process or execution, in

any civil action founded on such contract, for the sum of one hundred dollars or upwards; or if any person whose goods or estate are attached on mesne process in any civil action founded on such contract, for the sum of one hundred dollars or upwards, shall not, on or before the last day of the term of the court to which such process is returnable, dissolve the attachment in the manner herein after provided; (67) then, and in each of the cases aforesaid, any creditor, having a demand (68) against such person to the amount of one hundred dollars, for which a suit might then be brought, (69) and which is in its nature provable against the estate of an insolvent debtor, according to the foregoing provisions of this act, may, within ninety days, and not after, apply by petition to the judge of probate, or to any master in chancery, for the county in which the said debtor resides, (70) setting forth the said facts, (71) and praying that a warrant may issue, to take possession of the estate of the said debtor, and that such further proceedings may be had as are herein above provided for, dividing and distributing the same among all the creditors of such debtor. (72) And if the facts set forth in such petition shall appear to be true, (73) to the judge or the master in chancery to whom the same shall be presented, he shall forthwith, by warrant under his hand and seal, appoint some suitable person as messenger, to take possession of all the estate, real and personal, of such debtor, in like manner as above provided in the first section of this act, with respect to the warrant therein mentioned; and the messenger shall, in addition to the public notice above required in this behalf, give notice to the debtor of the issuing of the said warrant, in such manner as the judge or master in chancery shall in the same warrant prescribe. And thereupon the estate of the said debtor shall be taken, disposed of, and divided among his creditors, in like manner as it would or ought to be by force of a warrant issued according to the first section of this

act; and all the proceedings after the execution of the warrant issued by force of this section shall be conducted in the same manner as in this act is before provided, in reference to the proceedings commenced upon the petition of the debtor himself. (74)

(66) Under this statute proceedings could not be instituted on petition of a creditor, against the estate of a debtor who was not at the time a resident in this Commonwealth. *Claflin* v. *Beach*, 4 Met. 392. But by the thirteenth section of the statute of 1844, c. 178, proceedings may be so instituted, if the debtor has been a resident in the Commonwealth within one year before such application is made. See act of 1844, c. 178, § 13, note.

(67) Additional causes for proceeding against an insolvent debtor are enumerated in the ninth section of the statute of 1844, c. 178. By the twelfth section of that statute, the time within which attachments must be dissolved is changed, so that they must in all cases be dissolved within fourteen days from the return day of the writ, although the term to which such writ is returnable extends beyond that time. And by the act of 1851, c. 189, §§ 2, 3, the time is reduced to seven days, with a saving in case of accident or mistake.

The return of process must show distinctly that an attachment has been made of the debtor's specific goods, or of his real estate described, or of both, in order to authorize proceedings under this statute. *Dennis* v. *Sayles*, 11 Met. 233. In that case the return was, "I have attached all the right, title, and interest the within-named C. and A. have in and to any real estate in the towns of W. and A. and in the county of B."; which was held insufficient to support a petition on this section. But in the case of *Thompson* v. *Snow*, 4 Cush. 121, where the return showed an attachment of "all the right, title, and interest the within-named defendants have in right or in equity in any real estate within the towns of H. and C., and also in all and any real estate within the county of Franklin, and all the right and title of either of them in the same," and it appeared that there was real estate of the debtors which would be bound by this attachment, the court said they should be inclined to hold it sufficient to support the petition, but for the observations in *Dennis* v. *Sayles*, and, as it was not necessary, gave no opinion on the point.

An attachment by the trustee process is within the purview of this provision of the statute. And if the person who is summoned as trustee of the debtor permits himself to be defaulted, this is *primâ facie* evidence, at least, that the goods or estate of such debtor are attached in his hands and possession. *Kimball* v. *Morris*, 2 Met. 573.

If, where there is an attachment on mesne process, the defendant give judgment to the plaintiff in the middle of a term, the court will not, on the application of a creditor of the defendant, refuse to enter judgment until such time as the defendant should have dissolved the attachment, in order to enable the creditor to proceed against him under the insolvent act. *Boynton* v. *Senter*, in the Common Pleas, 4 Law Reporter, 229.

(68) A judgment on which execution has issued and been returned satisfied by a levy on real estate, although such estate was not the property of the judgment debtor, is not such a demand as will authorize proceedings *in invitum* against the judgment debtor on the petition of the judgment creditor, until the levy has been set aside on *scire facias*, pursuant to Rev. Stat., c. 73, § 21. *Dennis* v. *Sayles*, 11 Met. 233. See act of 1844, c. 178, § 9, note.

(69) By the act of 1844, c. 178, § 13, it is not necessary that the petitioning creditor's debt should be payable at the time of filing his petition.

(70) See *Penniman*, *Petitioner*, 5 Law Reporter, N. S. 28, as to what will constitute a residence such as to give jurisdiction under this section.

(71) The allegations of a petition under this section, though made on oath, are not to be treated as evidence of the facts alleged; they must be proved by competent evidence, to authorize the issuing of the warrant. *Jordan*, *Petitioner*, 9 Met. 292; *Stearns* v. *Kellogg*, 1 Cush. 449. See also *Foster* v. *Remick*, 5 Law Reporter, 406.

An affidavit made in another State, where it does not appear that notice of the taking of the affidavit was given to the debtor, or that it was impossible to give such notice according to the Revised Statutes, c. 94, § 33, is not competent evidence to prove the debt of the petitioning creditor. *Stearns* v. *Kellogg*, 1 Cush. 449.

The debtor cannot be examined as a witness on the preliminary hearing of the question whether he shall be adjudged an insolvent. *Jordan*, *Petitioner*, 9 Met. 292.

(72) Before the passing of the statute of 1844, c. 178, notice of the petition of a creditor was not required to be given to the debtor before the hearing and issuing of the warrant to the messenger. *Kimball* v. *Morris*, 2 Met. 573; *Wheelock* v. *Hastings*, 4 Met. 504. But since the passing of that statute a warrant to take possession of the estate of the debtor, on the petition of a creditor, cannot be legally issued in any case, before notice of the presentment of the petition has been served on the debtor, according to the provisions of the ninth section of said statute. The provision of that section, that notice of a petition by a creditor shall be given to the debtor, applies where the application is founded on any of the causes enumerated in the statute of 1838, as well as where founded on those enumerated in the statute of 1844. *Buck* v. *Sayles*, 9 Met. 459 *Thompson* v. *Snow*, 4 Cush. 121.

Where a warrant is issued against partners on the petition of a creditor, without notice to them, a formal waiver of notice, filed by one of them with the commissioner, does not make the proceedings good as against his copartner. *Thompson* v. *Snow*, 4 Cush. 121.

A debtor who had lodged and boarded in Boston, in the county of Suffolk, removed his lodgings to Brookline, in the county of Norfolk, but continued to do business in Boston, and to take his dinners at his former boarding-place. A petition was filed in Boston against him under this statute, and notice thereof was left at his lodgings in Brookline. Held, that, if the residence of the debtor was in Boston, the notice was not sufficient; and that if it was in Brookline, the commissioner had not jurisdiction. *Penniman, Petitioner*, 5 Law Reporter, N. S. 28.

(73) A judge of probate refused to issue a warrant against a debtor, on the petition of a creditor, because "it did not satisfactorily appear that there was, nor that there was not, one hundred dollars due" from the debtor to the petitioner. And it was held that this was an adjudication that it did not appear to the satisfaction of the judge that such sum was due from the alleged debtor to the petitioner. *Randall* v. *Barton*, 6 Met. 518.

It seems, that, if the petitioning creditor discover that there is doubt in the mind of the judge, as to whether one hundred dollars is due or not, he may apply for a further hearing to enable him to furnish additional evidence. *Randall* v. *Barton*, 6 Met. 518, 521.

If a judge refuse to grant the application of a creditor for a warrant against his debtor, he is not bound to keep a record of his proceedings, but his duty is performed by filing the petition. *Randall* v. *Barton*, 6 Met. 518.

The facts set forth in the petition of a creditor, under the nineteenth section of the act of 1838, for the issuing of a warrant against the estate of his debtor, must be proved by competent evidence to authorize the issuing of the warrant; and an affidavit made in another State, where it does not appear that notice of the taking of the affidavit was given to the debtor, or that it was impossible to give such notice according to the Revised Statutes, c. 94, § 33, is not competent evidence to prove the debt of the petitioning creditor. *Stearns* v. *Kellogg*, 1 Cush. 449.

(74) The act of 1838 conferred no power upon the judge of probate or master in chancery, to vacate the proceedings at any time after they should be instituted. But where a stay of proceedings became advisable, it was necessary, under that statute, in all cases, to apply to the Supreme Court, although all the parties in interest should desire their discontinuance. *In the Matter of Byrnes*, 8 Law Reporter, 374, S. J. C. Suffolk, 1845. The act of 1848, c. 304, § 13, vests this power in the commissioner of insolvency.

Of Bonds to dissolve Attachments.

SEC. 20. Any person whose goods or estate shall be attached on mesne process in any civil action, may, at any time before final judgment therein, dissolve such attachment, by giving bond, with sufficient sureties, to be approved by the court in which the action is pending, or by any justice thereof, or by any justice of the Supreme Judicial Court, (75) with condition to pay to the plaintiff in such action the amount, if any, that he shall recover therein, within thirty days after the final judgment in such action; and no sureties shall be deemed sufficient for this purpose, unless they are satisfactory to the plaintiff in the action, or it shall be made clearly to appear that each of the sureties, if there are only two, is worth a sum equal to that for which the attachment is laid; or, if there are more than two sureties, that they are all together worth twice the sum for which the attachment is laid, over and above what will pay all their debts. (76)

(75) By the act of 1850, c. 27, this duty was imposed upon the masters in chancery for the several counties, and a fee established for its performance.

(76) Where a bond is given under this section, and the defendant afterwards obtains his certificate of discharge under the insolvent law, which constitutes a good defence to the action, the plaintiff cannot have judgment notwithstanding the certificate, with a perpetual stay of execution, for the purpose of holding the sureties in the bond. *Loring* v. *Eager*, 3 Cush. 188. See *Davenport* v. *Tilton*, 10 Met. 320, 330.

If the certificate of discharge does not constitute a defence to an action in which an attachment has been dissolved by bond, the sureties therein may be liable, according to its terms, notwithstanding the plaintiff would have lost his security had no bond been given. *Loring* v. *Eager*, 3 Cush. 188.

The lapse of thirty days after judgment in the action against the principal obligor, without satisfaction, fixes the liability of the sureties; and such liability is not discharged by the subsequent commitment of the principal obligor, and his discharge from imprisonment by taking the poor debtor's oath. *Murray* v. *Shearer*, 7 Cush., 5 Law Reporter, N. S. 39, S. J. C. Suffolk, 1851.

Of Partnerships.

SEC. 21. Where two or more persons who are partners in trade become insolvent, a warrant may be issued in the manner provided in this act, either on the petition of such partners, or of any one of them, or on the petition of any creditor of the partners; (77) upon which warrant all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be by law exempted from attachment, (78) and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts. (79) And the assignees in such case shall be chosen by the creditors of the company; and they shall keep separate accounts of the joint stock or property of the company, and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignees the whole of the expenses and disbursements paid by them, the net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. (80) And if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective rights and interests therein, and as it would have been if the partnership had been dissolved without any insolvency; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. And in all such proceedings against partners, each one of them shall be entitled to the allowance before pro-

vided for the maintenance of himself and his family; and the allowance on the net produce of the estate, as provided in the eighth section of the act, shall be computed on the joint estate, and also on each of the separate estates, as if there had been a separate warrant against each, provided that neither of the partners shall receive in the whole more than five hundred dollars. And the certificate of discharge shall be granted or refused to each partner, as the same would or ought to be if the proceedings had been against him alone. And in all other respects the proceedings against partners shall be conducted in like manner as if they had been commenced and prosecuted against one person alone.

(77) It seems that after a formal dissolution of partnership, if partnership property remains unapplied and partnership debts are unpaid, creditors of the partnership may institute proceedings against the partners under the nineteenth section of the insolvent law, in the same manner as if there had been no dissolution. *Parker* v. *Phillips*, 2 Cush. 175.

After the dissolution of a partnership agreed on and published, proceedings in insolvency may be instituted on the sole petition of one of the partners, without notice to his copartners, so as not only to affect his own and the partnership property, but also the separate property of the late copartners. *Thompson* v. *Thompson*, 4 Cush. 127. If the other partners are aggrieved by such proceeding, their remedy is by application to the Supreme Judicial Court under the eighteenth section of the act of 1838, to suspend and vacate the proceedings, on showing that the partnership was not insolvent. And the case will be referred to a master to ascertain and report as to the truth of the allegations upon which the proceedings were commenced. But it is in the discretion of the commissioner of insolvency, and proper in all cases, to order notice of the petition to the, partners not petitioning, before issuing his warrant. *Thompson* v. *Thompson*, 4 Cush. 127.

The term "insolvency," as used in the insolvent law, does not mean an absolute inability of the debtor to pay his debts, at some future time, upon a settlement and winding up of all his affairs, but a present inability to pay, in the ordinary course of business. *Thompson* v. *Thompson*, 4 Cush. 127.

To authorize a warrant on the petition of one partner, after a dissolution of the partnership, against his separate estate and the joint estate of

the partnership, it must appear that the petitioner and the partnership are both insolvent; and it must be so alleged in the petition. *Parker* v. *Phillips*, 2 Cush. 175.

In that case, proceedings instituted against the partnership property and separate property of the petitioner, upon a petition which alleged that the petitioner was indebted individually and as copartner of the late firm named, in not less than five hundred dollars, which he was unable to pay in full, were held to be void.

Proceedings instituted against a partnership, after its dissolution, on the petition of one of the partners alone, were vacated by the Supreme Court, on the ground that it was not alleged, and did not appear, by the petition to the commissioner of insolvency, that the partners individually were insolvent. *Dearborn* v. *Keith*, 5 Cush. 224.

In the subsequent case of *Thompson* v. *Thompson*, 4 Cush. 127, where proceedings against the joint and separate estates of the partners of a firm which had been dissolved were sustained, though instituted on the petition of one of the partners alone, it does not appear that any of the partners were individually insolvent.

When real estate is purchased with partnership funds, for partnership use and convenience, although it is conveyed to the partners in such a manner as to make them tenants in common, yet, in the absence of an express agreement, or of circumstances showing an intent, that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them in their partnership capacity, clothed with an implied trust that they shall hold it until the purposes for which it was so purchased shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. *Dyer* v. *Clark*, 5 Met. 562; *Howard* v. *Priest*, 5 Met. 582; *Burnside* v. *Merrick*, 4 Met. 537.

In case of the death of one partner, the survivor has an equitable lien upon such real estate to indemnify him against the debts of the firm, and to secure the balance which may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified. *Dyer* v. *Clark*, 5 Met. 562. And if such surviving partner become insolvent, his assignees will be entitled to all such real estate, as against such widow and heirs, to be applied to the payment of such partnership debts as may be proved. *Howard* v. *Priest*, 5 Met. 582; *Burnside* v. *Merrick*, 4 Met. 537.

If the members of a partnership become insolvent, an assignment of their estate completely defeats the lien of an attachment of the separate property of one of the partners at a suit of a partnership creditor, and the

attached property is to be applied for the benefit of the separate creditors of the partner who owed it. *Allen* v. *Wells*, 22 Pick. 450.

(79) In bankruptcy it has been held that joint creditors cannot prove their debts against the separate estates of the partners, and receive dividends *pari passu* with the separate creditors of the several partners, if there be any fund, however small, belonging to the partnership, although such fund may have been created by the separate creditors purchasing some of the partnership estate actually worthless, for the sole purpose of creating it. *In the Matter of Marwick*, 8 Law Reporter, 169, District Court of United States, Maine, 1845.

If the estate of a debtor, who has been a member of a partnership that is dissolved, is assigned under the insolvent laws, creditors of the partnership are entitled to prove their claims against him, and an account is to be kept, distinguishing between his separate and joint debts which are so proved. *Barclay* v. *Phelps*, 4 Met. 397.

If two partners become insolvent and obtain their certificates of discharge, and one of them, whose certificate is afterwards annulled, becomes again insolvent, a partnership debt, which has been proved in the former proceedings as such, may be proved as a several debt in the second proceedings. *Gates* v. *Mack*, 5 Cush. 613.

Two partners signed their individual names to a note, as sureties therein, and afterwards became insolvent, and their joint and separate estates were assigned under the insolvent law. The holder of the note was held to be entitled to prove the note against the separate estates of the sureties. *Ex parte Weston*, 12 Met. 1.

A note signed by partners in their individual names, if given on their partnership account, is a debt against the partnership; and in case of the individual insolvency of one of the partners, without an assignment of the joint estate, the holder of the note, although he received the same of the payee without notice of the partnership, will not be entitled to a dividend of the separate estate of the insolvent, *pari passu*, with his separate creditors; but may prove the note in the proceedings, and will be entitled to a dividend only out of the surplus after paying all the separate debts of the insolvent, as in case of any other partnership debt. *Agawam Bank* v. *Morris*, 4 Cush. 99.

Where a partnership and the individual members of it were declared bankrupt under the bankrupt law of the United States of 1841, it was held that a bill of exchange drawn by the firm, and indorsed by one of the partners, was provable against the joint estate of the partnership and the separate estate of the partner who indorsed it; and that the holder was entitled to a dividend on the whole amount of the bill, out of each estate. *In the Matter of Farnum*, 6 Law Reporter, 21, United States District Court, Massachusetts, 1843.

(80) In case of the insolvency of partners, one of the partners being indebted to the partnership, such indebtedness cannot be proved against the estate of the debtor partner, in favor of the copartnership. *Somerset Potters' Works* v. *Minot*, S. J. C. Suffolk, 1853.

Of Limited Partnerships.

SEC. 22. When the general partners in any limited partnership, formed agreeably to the provisions of the thirty-fourth chapter of the Revised Statutes, become insolvent, the same proceedings in all respects may be had as are provided in the preceding section, except that the separate estates and separate debts of the special partner in such limited partnerships shall not be subject to any of the proceedings against such partnerships.

Provision where a Debtor or Assignee refuses to obey the Order of the Judge.

SEC. 23. In case any insolvent shall refuse or unreasonably neglect to execute any instrument which he shall be lawfully required, by virtue of this act, to execute, pursuant to an order of the judge, or shall disobey any lawful order or decree of the judge, in relation to the settlement of his estate pursuant to this act, the judge shall issue his warrant to any civil officer, commanding him to arrest and commit such debtor to the common jail in the county where such debtor may be found, or where he dwelt at the time of his insolvency; and the said debtor shall remain in close custody until he shall obey the order or decree of the said judge, unless he shall be released therefrom by the Supreme Judicial Court or some justice thereof, on a writ of habeas corpus, pursuant to law; (81) and any assignee appointed by virtue of this act, who shall refuse or unreasonably neglect to execute any instrument which he shall be lawfully required by the judge to execute, or shall disobey

any lawful order or decree of the judge in the premises, shall be liable to be committed to and detained in the common jail of the county where he may be found, or he dwelt at the time when he was appointed assignee, until he shall obey the said order or decree, unless he shall be released therefrom in manner aforesaid.

(81) A judge of probate may issue a warrant to arrest and imprison a debtor for refusing to obey his order that the debtor appear at a third meeting of his creditors, and produce a schedule of his debts, and submit to an examination on oath, concerning his estate. *Kimball* v. *Morris*, 2 Met. 573. But where the proceedings in insolvency are instituted on the petition of a creditor, under the nineteenth section of this statute, in a petition to the Supreme Judicial Court for a writ of mandamus, requiring the judge to issue his warrant to arrest the insolvent for disobeying the order or decree of such judge, it must be alleged, and proved or admitted at the hearing, that the facts required by that section of the statute to be set out in the petitioning creditor's application for proceedings against the debtor appeared to such judge to be true. *Kimball* v. *Morris*, 2 Met. 573.

A debtor failed to appear and submit himself to examination at the second meeting of his creditors, according to the order of the master in chancery, who issued his warrant to imprison the debtor until he should obey the order. On a writ of habeas corpus by the debtor, it was objected to the warrant that it was inconsistent, and, from its being impossible for him to obey an order to appear at a time which had passed, that it would keep him in perpetual imprisonment, and was for this reason void. The objection was not sustained by the court. *Case of Thompson*, 7 Law Reporter, 159.

Debts of Operatives privileged.

Sec. 24. Any person who shall have performed any labor as an operative in the service of any insolvent shall be entitled to receive from the assignee of such insolvent the full amount of the wages due to him for such labor, not exceeding twenty-five dollars, provided that such labor shall have been performed within sixty-five days before the insolvency of his employer; and such debts shall be deemed to be preferred debts next after debts due to the United States and to the Commonwealth. (82)

(82) It is no objection to the claim of the statute privilege by a creditor under this section, that the creditor performed the labor claimed for on his own premises, and not on those of his employer. Nor that he was to be paid for his work *by the piece*, and not according to the time which he worked. *Thayer* v. *Mann*, 2 Cush. 371.

A creditor may be entitled to a preference under this section, in respect to a debt for labor done by his wife, as an operative. *Thayer* v. *Mann*, 2 Cush. 371.

As to the remedy in case the commissioner refuses to allow a debt as privileged, see that case, and note to § 4 of this act.

Laws inconsistent herewith, repealed.

SEC. 25. All the provisions of law inconsistent with the provisions of this act are hereby repealed; (83) saving all rights which have accrued to any person by virtue of the same, which shall be judged and decided upon in the same manner as if this act had not been passed. (84)

(83) The assignment law of 1836, c. 238, was repealed by this statute, so far as it affected the same class of persons. *Carter* v. *Sibley*, 4 Met. 298.

(84) An attachment on mesne process, made before the insolvent law went into operation, is a "right" within the meaning of the saving clause. *Kilborn* v. *Lyman*, 6 Met. 299. But an attachment made during the suspension of the insolvent law by the statute of 1842 is not such a *right*. *Ward* v. *Proctor*, 7 Met. 318. Rights to come within this saving clause must have accrued before the insolvent law went into operation. *Ward* v. *Proctor*, 7 Met. 318.

When this Act to take effect.

SEC. 26. This act shall go into operation from and after the first day of August next.

ACT PASSED MARCH 18, 1841. CHAPTER 124.

AN ACT IN ADDITION TO AN ACT FOR THE RELIEF OF INSOLVENT DEBTORS.

Act of 1838 *extended.*

SEC. 1. The first section of an act relating to insolvent debtors, passed on the twenty-third day of April, in the year one thousand eight hundred and thirty-eight, is hereby so far amended as to extend its provisions to any applicant whose debts may amount to a sum not less than two hundred dollars.

Schedule of Property.

SEC. 2. The sixth section of said act is so far amended as to require the debtor to present, at the first meeting of the creditors, a schedule of all his real and personal estate, giving a description of the same, and stating where it is situated, said schedule to be delivered to the assignees.

Preferences.

SEC. 3. The provisions of said act are hereby so far extended, that no certificate of discharge shall be granted, or, if granted, it shall be of no effect, if a debtor, within six months before the filing of the petition by or against him,

shall procure his lands, goods, moneys, or chattels to be attached, sequestered, or seized on execution, or being insolvent, or in contemplation of insolvency, (85) shall, directly or indirectly, make any assignment, sale, transfer, or conveyance, either absolute or conditional, of any part of his estate, real or personal, intending to give a preference to a preëxisting creditor, or to any person who is or may be liable as indorser or surety for such debtor, unless said debtor shall make it appear that at the time of making such preference he had reasonable cause to believe himself solvent, and all preferences so made or intended to be made shall, as to the other creditors, be void; (86) and the assignees may recover the full value of the property so transferred, or the property itself, from the creditor so preferred; provided the creditor, when accepting such preference, had reasonable cause to believe such debtor was insolvent. (87)

(85) The words "in contemplation of bankruptcy," as used in the bankrupt law of 1841, refer to an act done with the intention to contravene that law. Such intent cannot be inferred from the actual bankruptcy of the debtor. *Jones* v. *Howland*, 8 Met. 377. See act of 1838, c. 163, § 10, notes.

In an action by a mortgagee of personal property, to recover the same from the assignee in insolvency of the mortgagor, the defence set up was that the mortgage was void under this section of the law; and the court at the trial instructed the jury, that, to maintain the defence, the defendants must prove that the mortgagor, being insolvent and knowing his situation, and in expectation or anticipation of stopping payment, made the mortgage to the plaintiff, with the intention to give him a preference for preëxisting debts over the general creditors, and that the plaintiff had reasonable cause to believe him insolvent. It was held that in some respects this charge was too favorable to the plaintiff. It is not necessary, to avoid the conveyance, to show that the debtor knew he was insolvent, or in fact contemplated proceedings in insolvency, when he made the mortgage. It is enough that he was in fact insolvent, and had reasonable ground to believe himself insolvent. Nor will an honest belief by the debtor that he could go on, and an intention to do so, save the conveyance. *Holbrook* v. *Jackson*, 7 Cush., Suffolk, 1851.

(86) This provision of the statute of 1841 applies to proceedings instituted before its enactment. In such case, if the insolvent had not obtained his discharge at the time when that statute went into operation, he would not be entitled to it, if he had given a preference to a preëxisting creditor at any time within six months before the filing of the petition by or against him, although he would have been entitled to his discharge under the statute of 1838. A debtor acquires no vested right to his discharge, by the institution of proceedings by or against him, under the laws as they exist at the time of the application for such proceedings. His right to a discharge is to be determined according to the laws as they exist at the time of his application for the certificate. *Ex parte Lane*, 3 Met. 213; *Eastman* v. *Hillard*, 7 Met. 420.

If an insolvent has made a conveyance or transfer of property to a preexisting creditor at any time within six months before the proceedings were instituted, the burden is upon him to show that at the time of such transfer he had reasonable cause to believe himself solvent. *Lane* v. *Haynes*, 8 Law Reporter. 499. See *Ex parte Jordan*, 9 Met. 292, and act of 1844, c. 178, § 9, note.

(87) The words "intending to give a preference," in this section, apply to all the modes of giving a preference, whether by attachment, seizure on execution, or direct assignment; and are not limited in their application to cases of direct assignment. So, if a debtor procures his estate to be attached, or taken in execution, with the intention to prefer a creditor, and it is so taken, within six months before the filing of the petition by or against him, then it may be recovered back by the assignees; provided the creditor had reasonable cause to believe the debtor insolvent. *Lane* v. *Haynes*, 8 Law Reporter, 499.

But the provisions of this section do not extend to a payment of money by a debtor to his creditor; and money so paid by a debtor cannot be recovered back by his assignee, although the payment was made with the intent to prefer such creditor. *Wall* v. *Lakin*, 13 Met. 167.

So, though the creditor at the time of such payment purchased goods of the debtor, knowing him to be insolvent. *Wall* v. *Lakin*, 13 Met. 167. But see act of 1838, c. 163, § 10, as to effect of a payment of money with the intention of becoming insolvent under the statute.

Partners sold their stock in trade to their brother, taking his notes for the price. The stock was soon after attached in an action brought in the Circuit Court of the United States, in November, 1846. A few days afterwards, an arrangement was made by which the attachment was dissolved and the said notes placed in the hands of a trustee, to collect the same and pay the attaching creditors seventy-five per cent. of their debts, and the surplus, if any, to other creditors who had agreed to the arrangement; and the trustee agreed to hold the notes for this purpose. After-

wards the debtors applied for the benefit of the insolvent law, and their estate was assigned to an assignee, January 4, 1847. The assignee brought trover against the trustee, to recover the value of the said notes, and it was held that the trustee took them for value, and that the assignee was not entitled to recover. It was also held, that by suing for the notes the assignee affirmed the sale of the stock of goods, and could not afterwards avoid the same. *Perkins* v. *Webster*, 2 Cush. 480.

A mortgage made by a debtor to an attaching creditor, in order to obtain a discharge of the attachment, the debtor not being able to go on in business while the attachment was in force, is void under this section, and the mortgaged property cannot be recovered of the assignee, in an action by the mortgagee, provided that when he took the mortgage he had reasonable cause to believe the debtor insolvent. *Denny* v. *Dana*, 2 Cush. 160.

In such action, in order to show that the mortgagee had reasonable cause to believe the debtor insolvent, it is competent to ask a witness whether, at the time of the execution of the mortgage, it was not a fact known in the community that the business in which the debtor was engaged was a ruinous business to those engaged in it. *Denny* v. *Dana*, 2 Cush. 160.

In an action by assignees to recover property conveyed, in fraud of this section, by an insolvent to his creditor, the burden is upon the plaintiffs to show that the creditor had such reasonable cause. *Butler* v. *Breck*, 7 Met. 164; *Lane* v. *Haynes*, 8 Law Reporter, 499.

But the intention of the parties in making a conveyance may be inferred from their acts. And where a debtor consented to judgment on the first day of the term at which an action against him was entered, whereby the creditor was enabled to take out and levy his execution before the usual time, it was held that this fact was evidence tending to show an intention to prefer, under the circumstances of the case, which showed a wide departure from the ordinary course of procedure. *Lane* v. *Haynes*, 8 Law Reporter, 499.

The mere fact that a debtor, two months before his insolvency, assigned debts as collateral security for a preëxisting debt of an amount nearly double the debt to be secured, is not sufficient to authorize the conclusion that the creditor had reasonable cause to believe the debtor insolvent. *Porter* v. *Bullard*, 26 Maine (13 Shepl.) 448.

In an action by an assignee to recover property conveyed by the insolvent a short time before proceedings in insolvency were commenced against the debtor, on the petition of his creditors, the debtor is a competent witness for the purchaser. *Clark* v. *Gordon*, 13 Met. 434.

Where the assignee of an insolvent debtor files a bill in equity, praying that the defendant, to whom such debtor has mortgaged land for the pur-

pose of giving an illegal preference, may be ordered to give up the mortgage or convey the land to the assignee, but waiving all claims to discovery from the defendant and to an answer on oath, and relying wholly on proofs within the plaintiff's own power, the bill shows that the plaintiff has a plain, adequate, and complete remedy at law by a writ of entry, and that the court have no jurisdiction in equity. *Thayer* v. *Smith*, 9 Met. 469.

Nor will such bill lie, though it contain a prayer for discovery. *Woodman* v. *Saltonstall*, 7 Cush., 4 Law Reporter, N. S. 35, S. J. C. Suffolk, 1851.

The assignee of an insolvent debtor, who has commenced an action at law against the mortgagee, to recover for personal property mortgaged by the debtor before his insolvency, may maintain a bill of discovery against the mortgagee to compel him to answer in respect to any facts which may impeach his title under the mortgage. *Adams* v. *Porter*, 1 Cush. 170.

A mortgage of personal property, which, in regard to some portion of the debt, is void as being in contravention of the insolvent law, is wholly void. *Denny* v. *Dana*, 2 Cush. 160.

Of Costs, where a Discharge is pleaded.

SEC. 4. No person discharged by this act, or that to which this is in addition, shall, by reason of such discharge, recover costs against any plaintiff who shall have commenced any suit against him previous to such discharge. (88)

(88) But by the act of 1848, c. 267, where a discharge is set up in defence and an issue is made up and found for the defendant, he shall be entitled to costs.

By the act of 1843, c. 55, where a discharge is relied upon in defence, and the plaintiff discontinues or is nonsuited, the defendant cannot recover costs. See note to that act.

One summoned as trustee in the trustee process, who, after filing his answer as such, becomes insolvent and obtains his discharge, and is afterwards discharged as trustee on his answer, is entitled to cost. *Penniman* v. *Matthews*, 3 Cush. 341.

Of preserving Attachments.

SEC. 5. Should it appear to the judge of probate, or master in chancery, that a dissolution of any attachment pursuant to the provisions of the fifth section of the act to which this is in addition, would prevent said attached property from passing to the assignees, the attachment upon his order shall survive, notwithstanding the provisions of said section, and the assignees shall have power, with the permission of the court to which said writ is returnable, to proceed with the suit against the insolvent to final judgment and execution, and the amount recovered, exclusive of costs, shall vest in the assignees. (89)

(89) A master in chancery, after reciting that attachments had been laid on the estate of an insolvent debtor by A and B, and certain other persons whose names were to him unknown, passed an order that such attachments should survive, that the assignee should have power to proceed with the suits in which the attachments were made, and that the messenger should give notice to the attorneys in the suits, and to the attaching officers, by serving them with an attested copy of said order. Such service was made on all the attaching officers and on the attorney of C, an attaching creditor not named in the order. It was held that C's attachment survived, and that the assignee might proceed to prosecute the same against the debtor. *Denny* v. *Lincoln*, 13 Met. 200.

Where an assignee comes in to prosecute under this section, he may proceed to final judgment and execution in his own name. *Bacon* v. *Lincoln*, 2 Cush. 124.

If an assignee recovers judgment in an action prosecuted under this section, he will be entitled to recover all the costs which have been incurred in the suit; not only those incurred by himself, but those also which accrued before he came into the action, and he will hold them subject to the right of the plaintiff and of his attorney to be reimbursed the costs by them incurred in the suit. *Bacon* v. *Lincoln*, 2 Cush. 124.

In an action prosecuted under this section, an attaching officer who has taken a receipt for the property attached from a third person, and delivered the property to the debtor, who has converted the same to his own use, is estopped by his return to deny that the property is in his hands, both as against the original creditor and the assignee. *Bacon* v. *Lincoln*, 2 Cush. 124.

Where the execution in such case is taken out in the name of the assignee, it is the business of the officer who made the attachment, on receiving the execution, to ascertain from the record whether the execution is issued in the suit in which the attachment was made. *Bacon* v. *Lincoln*, 2 Cush. 124.

Costs, when a Privileged Debt.

SEC. 6. Whenever an attachment on mesne process is dissolved by virtue of proceedings under the act to which this is in addition, if the claim upon which the suit was commenced shall be proved against the estate of the insolvent, the plaintiff in such suit shall be allowed to prove against the said estate the legal fees, costs, and expenses of such suit, and of the custody of the property, and the amount thereof shall be considered a privileged debt, and have a priority or preference, and be paid in full, after the payment of those debts which now have a priority or preference by virtue of the provisions of the act to which this is in addition. (90)

(90) If the *debt* is not provable, the costs cannot be proved as a privileged debt, or for any purpose. So where judgment is recovered against a defendant after his insolvency, in an action pending when he became insolvent, the judgment *debt* is not provable, and the *cost* cannot be proved under this section, on the ground that an attachment was dissolved by the insolvency of the defendant. *Sampson* v. *Clark*, 2 Cush. 173. See *Morris* v. *Briggs*, 3 Cush. 342.

As to whether the dissolution of an attachment of "all the debtor's real estate" will entitle the creditor to prove his costs under this section without showing that property was actually attached, see *Dennis* v. *Sayles*, 11 Met. 233.

ACT PASSED MARCH 3, 1842. CHAPTER 71.

AN ACT TO SUSPEND "AN ACT FOR THE RELIEF OF INSOLVENT DEBTORS, AND FOR THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS."

Act of 1838 *suspended.*

THE act passed on the twenty-third day of April, in the year one thousand eight hundred and thirty-eight, entitled, "An Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," except the twentieth section thereof, shall be suspended so long as the bankrupt law of the United States shall continue in force: *provided*, that nothing in this act contained shall affect any proceedings which may be pending under the provisions of the act hereby suspended, when this act shall take effect; nor revive, or give any force or effect to, the act passed the fifteenth day of April, in the year eighteen hundred and thirty-six, entitled, "An Act to regulate the Assignment and Distribution of the Property of Insolvent Debtors."

ACT PASSED MARCH 23, 1843. CHAPTER 55.

AN ACT RELATING TO COSTS IN CIVIL ACTIONS.

Costs, where Bankruptcy is pleaded.

In all civil actions now pending or which may be hereafter entered in any court in this Commonwealth, in which the bankruptcy of the defendant shall be pleaded, and such action shall be discontinued, or the plaintiff nonsuited, solely in consequence of such plea, the defendant shall recover no costs against the plaintiff. (91)

(91) If a defendant specifies, among other grounds of defence, a certificate of discharge, the court is bound, under this act, to allow the plaintiff to discontinue solely on the ground of the certificate; or, if the defendant insists on going to trial, to require him to waive his certificate and proceed on his other grounds of defence. *Goward* v. *Dunbar*, 4 Cush. 500. See acts of 1841, c. 124, § 4, and 1848, c. 267.

Where an action is discontinued by the plaintiff in such case, the commencement of the action will not have the effect to stop the running of the statute of limitations, under the Revised Statutes, c. 120, § 11. *Swan* v. *Littlefield*, 6 Cush. 417.

ACT PASSED MARCH 16, 1844. CHAPTER 178.

AN ACT IN FURTHER ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Courts of Insolvency.

SEC. 1. (92) Every judge of probate, or master in chancery, shall, on the second Monday of every month, hold a court in some convenient place, for the proof of claims, the examination of debtors, the granting of discharges, the settlement of assignees' accounts, and the declaring of dividends in cases pending before him, and for doing any other matter now cognizable before said judge or master, relating to insolvency, and said proceedings shall be transacted only in said court, and after due notice to all parties in interest; and if all the business in insolvency before said judge of probate, or master in chancery, cannot be completed on said day, said judge of probate or master in chancery may adjourn his court to the next day, and so from day to day, until the same shall, legally and properly, with all reasonable despatch, be disposed of. (93)

(92) The first and second sections of this statute were repealed by the act of 1846, c. 168, § 2.

(93) The provisions of this act apply to proceedings instituted before it went into operation. And a discharge granted while this act was in

force, at a meeting not appointed and adjourned according to its requirements, is void. This act went into operation on the 15th of April, 1844; a *second meeting* was appointed to be held on that day, and was adjourned to the second Monday of May then next, and then to the second Monday of June, and so on from second Monday to second Monday, until the second Monday of October, and then to the 6th of November, when a discharge was granted to the debtor, which discharge was held to be void. *Eddy* v. *Ames*, 9 Met. 585.

Courts to be always open.

SEC. 2. Said courts shall be considered open at all times for the reception of petitions, the issuing of warrants, the approval of compositions, assignees' bonds, and sales, requiring the approval of a judge of probate, or master in chancery.

Fiduciary Debts.

SEC. 3. No debt hereafter created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee, or assignee of an insolvent estate, shall be discharged under this act; but the creditor thereto may prove the same, and the dividend declared thereon shall be payment for so much of said claim, and every certificate of said discharge shall contain a statement of the debts created as aforesaid, to be exempted therefrom. (94)

(94) A collector of taxes of a town or city is a "public officer"; and the amount due from him to such town or city, on account of taxes collected, is a fiduciary debt. *Morse* v. *The City of Lowell*, 7 Met. 152. It would seem, that a debt due from a factor to his principal, for money received by him on account of a sale of goods belonging to the principal, is not a fiduciary debt within the meaning of this section. *Hayman* v. *Pond*, 7 Met. 328.

Dissent of Creditors.

SEC. 4. If the assets of the estate of any debtor shall pay fifty per cent. of the claims proved against his estate,

he shall be discharged from all claims against his estate, excepting those mentioned in the third section; and if said assets pay less than fifty per cent. on all claims proved as aforesaid, the debtor shall be discharged from all claims against his estate, excepting those mentioned in the third section, unless a majority in value of his creditors, who shall have proved their claims, shall dissent therefrom within six months after the date of the assignment; and if they do thus dissent, he shall not be discharged. (95)

(95) Since this statute went into operation a certificate of discharge cannot be granted to an insolvent until after the lapse of six months from the date of the assignment of such insolvent's estate. And the statute applies to an insolvent in whose case the proceedings were instituted before this act went into operation, but who had not obtained his certificate at that time. Such insolvent cannot obtain his certificate until six months from the date of the assignment. So far as the provisions of this statute are inconsistent with those of previous statutes, they must apply to and regulate proceedings instituted under such previous statutes before the statute of 1844 took effect. *Eastman* v. *Hillard*, 7 Met. 420. See also *Ex parte Lane*, 3 Met. 213.

But where, before the statute of 1844 was passed, the discharge of an insolvent was withheld on the dissent and objection of a majority in value of his creditors, according to the provision of the seventh section of the statute of 1838, and he appealed to the Supreme Judicial Court, as provided in the eighth section of that statute, and a hearing was had on the appeal after the statute of 1844 took effect, but there was no dissent of creditors after that time, and within six months from the date of the assignment, it was held that this section offered no objection to the granting of a certificate of discharge to such insolvent. *Ex parte Bartlett*, 8 Met. 72.

The twelfth section of the act of 1838, c. 163, requiring the third meeting of creditors to be held within six months from the time of the appointment of assignees, is not repealed by this act; and where a third meeting has not been called, a certificate of the insolvent's discharge is not valid against a creditor who has not proved his claim. *Sanderson* v. *Taylor*, 1 Cush. 87.

A discharge granted at a third meeting of creditors, held after the lapse of six months from the date of the assignment, is void. *Williams* v. *Robinson*, 4 Cush. 529; *Crocker* v. *Stone*, 7 Cush., S. J. C. Suffolk, 1851.

It is not necessary that a dissent should be filed at a meeting of creditors; it may be filed at any time before the expiration of the six months,

and where a third meeting was held on the fourteenth of the month, on the sixteenth of which the six months would expire, at which meeting, it not appearing that a majority in value of creditors had dissented to the granting of the debtor's discharge, the judge of probate ordered that a certificate issue to bear date and take effect on the seventeenth of the month, and on the sixteenth another creditor filed his dissent, which, with those before filed, amounted to more than a majority in value of the creditors who had proved their claims, it was held that the discharge was granted within the six months, that the dissent filed on the sixteenth, though rejected by the judge, was properly filed, and that the discharge was void. *Gardner* v. *Nute*, 2 Cush. 333.

Where a third meeting is held within the six months, and is adjourned to a day beyond that time, a creditor who proves his debt at such adjourned meeting cannot then file a dissent to the debtor's discharge. Whether a dissent filed within the six months, proof of the creditor's claim not being made until after the lapse of that time, would be effectual, is doubtful. *Revere* v. *Newell*, 4 Cush. 584. See act of 1838, c. 163, § 15, note.

In the case of the insolvency of a partnership, where the partnership estate did not pay fifty per cent. of the joint debts, and the separate estate of one of the partners paid fifty-five per cent. of his separate debts, it was held that such partner was entitled to his discharge from his separate debts, but not to affect the proceedings against him as partner. *Baker, Appellant*, 7 or 8 Cush., 4 Law Reporter, N. S. 388, S. J. C. Worcester, 1851.

This section was repealed by the act of 1848, c. 304, § 16.

Second Insolvency.

SEC. 5. No discharge of a debtor under this act, and the acts to which this is in addition, or any of them, shall be granted, or valid, if said debtor shall be a second time insolvent under said acts, or any of them, and the assets of his estate shall fail to pay fifty per cent. of the debts and claims proved against him, unless three fourths in value of the creditors whose claims are proved shall assent thereto in writing. (96)

(96) If a debtor become a second time insolvent, although he failed to obtain his discharge in the former proceedings, he will not be entitled to his discharge, under this section, if his assets fail to pay fifty per cent. of

the debts proved, unless three fourths of his creditors whose claims have been proved assent thereto; and if granted without such assent of creditors, it will be of no effect. *Tebbetts* v. *Pickering*, 5 Cush. 83.

Third Insolvency.

SEC. 6. No discharge of a debtor under this act, and the aforementioned acts, or any of them, shall be granted or valid, if said debtor shall be a third time insolvent under said acts, or any of them.

Dividends, when to be made.

SEC. 7. Whenever an assignee shall have received from the estate assets sufficient to pay fifty per centum of the debts and claims proved against said estate, he shall certify the fact, and render his accounts therefor to the judge of probate, or master in chancery, before whom the case is pending; and again, whenever he shall have received twenty-five per centum more from said assets, he shall certify and render his accounts therefor, as aforesaid; and the said assignee shall certify and render his accounts at any time when required thereto by the judge of probate, or master in chancery, before whom the process of insolvency shall be pending, without regard to the amount of assets then in his hands.

Effect of Payment of preëxisting Debts by a Debtor.

SEC. 8. No discharge of any debtor under this act, and the aforementioned acts, or any of them, shall be granted, or valid, if the debtor hereafter, when insolvent, shall within one year next before filing of the petition, by or against him, pay or secure, either directly or indirectly, in whole or in part, any borrowed money or preëxisting debt, or any liability of his or for him, if the creditor proves that,

at the time of making said payment, or giving said security, the debtor had reasonable and sufficient cause to believe himself insolvent.

Grounds for Involuntary Proceedings.

SEC. 9. In addition to the several causes for proceeding against an insolvent debtor, enumerated in the statute of 1838, c. 163, § 19, if any person shall remove himself, or his property, or any part thereof, from the Commonwealth, with intent to defraud his creditors, or shall conceal himself to avoid arrest, or his property, or any part thereof, to prevent its being attached, or taken on any legal process, or procure himself or his property to be arrested, attached, or taken on any legal process, or make any fraudulent conveyance (97) or transfer of his property, or any part thereof, then any of his creditors, whose claims, provable against his estate under this act, and the aforementioned acts, or any of them, amount to the sum of one hundred dollars, may apply by petition, stating the facts and the nature of said claim or claims, verified by oath, to the judge of probate or the master in chancery in the county in which said debtor resides, or last resided, praying that his estate may be seized and distributed according to law; and thereupon the judge of probate, or master in chancery, after notice of the presentment of said petition, given to said debtor by a copy thereof, served personally on said debtor, or left at his last and usual place of abode, (98) and a hearing before said judge of probate or master in chancery of the petitioners and debtor, or his default to appear at the time and place in said notice appointed, if the facts set forth in said petition shall appear to said judge of probate or master in chancery to be true, he shall forthwith issue his warrant to take possession of the estate of said debtor, and such further proceedings shall be had as are provided, and may be necessary, for

distributing the same among the creditors of such debtors, according to the intent of said acts.

(97) The term "fraudulent conveyance," as here used, does not mean simply a conveyance that would be fraudulent at common law, but includes such conveyance as was made void by the statute of 1841, c. 124. *Jordan, Petitioner*, 9 Met. 292; *S. C.*, 8 Law Reporter, 119.

To authorize a master in chancery to issue a warrant on the petition of a creditor, on the ground that the debtor has made a fraudulent conveyance, in the case of a mortgage to a creditor which would not be a fraud at common law, the master must be satisfied, —

1. That the debtor was insolvent in fact or contemplated proceedings in insolvency at the time that he made the conveyance, and that he did it with a view of giving a preference to a preëxisting creditor.

2. That he then had no reasonable cause to believe himself solvent.

3. That the creditor at the time had reasonable cause to believe the debtor insolvent. The burden of proving the first and third propositions is upon the petitioning creditor, and he must prove them by competent evidence. The debtor cannot be examined in such preliminary proceedings, nor can the allegations in the petition be treated as evidence; they are only ground for the hearing. *Jordan, Petitioner*, 9 Met. 292; *S. C.*, 8 Law Reporter, 119.

(98) The provision that notice of a petition by a creditor shall be served on a debtor applies to all cases, as well where the petition is for any of the causes enumerated in the statute of 1838 as where it is for any of the additional causes enumerated in this statute. *Buck* v. *Sayles*, 9 Met. 459; *S. C.*, 8 Law Reporter, 319; *Thompson* v. *Snow*, 4 Cush. 121.

And where proceedings are commenced against partners on the petition of a creditor, without notice to them, as required by this statute, a formal waiver of such notice, signed by one of the partners and filed with the commissioner, will not make the proceedings good as against his copartner. *Thompson* v. *Snow*, 4 Cush. 121.

Warrant to be directed to Sheriff.

SEC. 10. The warrant shall, in all cases, be directed to the sheriff, or either of his deputies, in the county in which the debtor resides, or last resided.

Assignees to give Bond.

SEC. 11. The assignee or assignees chosen or appointed as is provided in the acts to which this is in addition, or any of them, if required by a majority in value of the creditors who have proved their claims, before entering on the duties of his or their said office, shall give bonds to the judge of probate or master in chancery before whom the proceedings shall be, with sufficient surety or sureties, for the faithful performance of their duties. Said bonds shall be approved by the judge of probate or master in chancery, by his indorsement thereon, and shall be filed with the record of the case, and enure to the benefit of all creditors who may prove their claims, and may be prosecuted in the manner provided by law for the prosecution of bonds given to judges of probate by administrators or executors. (99)

(99) By the act of 1848, c. 304, § 12, the commissioner may require the assignee to give such bond in all cases. And by act of 1853, c. 116, he must give bond whenever a creditor who has proved his claim shall, in writing filed, request the same.

Attachments must be dissolved in Fourteen Days.

SEC. 12. If any person whose goods or estate are attached on mesne process, in any civil action founded on contract, for the sum of one hundred dollars or upwards, shall not, within fourteen (100) days from the return day of the writ, if the term of the court to which the process is returnable shall so long continue, or on or before the last day of said term, if said court shall sooner rise, dissolve the attachment in the manner referred to in said nineteenth section of the one hundred and sixty-third chapter of the statutes of 1838, any creditor may proceed against such person in the manner provided for in said act. (101)

(100) By the act of 1851, c. 189, § 2, this time is reduced to seven days; and § 3 of the same act provides a remedy in case of a failure to dissolve an attachment by accident or mistake.

(101) This provision includes creditors who are such within the "fourteen days" only, and not such as become creditors after the lapse of that time; as the indorser of a note made by the debtor, who pays it after the fourteen days have elapsed. *Hoffendahl* v. *Evers*, S. J. C. Middlesex.

Debt of Petitioning Creditor. — Residence of Debtor.

SEC. 13. The provision contained in the said nineteenth section of the one hundred and sixty-third chapter of the statutes of 1838, in favor of any creditor having a demand to the amount of one hundred dollars, for which a suit might be brought, shall be extended to any creditor to that amount, notwithstanding the debt may not have become payable, and a right of action accrued thereon. And whenever any debtor, against whom a petition for a process of insolvency may be preferred, as provided for in the act aforesaid, shall have removed from the Commonwealth, the proceedings may be instituted and prosecuted in the county in which he last resided therein; *provided*, he had a residence in the Commonwealth within one year next before the commencement of said process. (102)

(102) A and B were partners doing business in New Hampshire until September or October, 1849, when A came to Lynn in Massachusetts, with his family. In December, 1849, he went to St. Louis, Missouri, and his wife went to Lowell in this State. B had not left New Hampshire when proceedings in insolvency were commenced in Essex county, in January, 1850, on the petition of a creditor, who caused their property in this State to be attached on a writ returnable at the January term of the Court of Common Pleas, 1850. It was held that A, by leaving New Hampshire with the intention of not returning, acquired a domicile at Lynn, which was not changed by the removal of his wife to Lowell; that the proceedings were properly instituted in Essex county; that the fact that one of the partners resided out of the State could not prevent proceedings here against his copartner, and that the assignment would apply to all the property of the debtor within the reach of the assignee. It appeared in the case that there was joint property of the concern in this State.

Whether the assignment would pass property not in this State, *quære*. *McDaniel* v. *King*, 5 Cush. 469.

Fee for Issuing a Warrant.

SEC. 14. The judge of probate or master in chancery shall be paid, for receiving and allowing the original petition and issuing his warrant thereon, the sum of two dollars.

Provisions in Case of Death or Expiration of Office of the Judge.

SEC. 15. Any officer having jurisdiction under this act, and the several acts to which this is an addition, shall have power and authority to finish and close any case of insolvency which may have been entered before him during his term of office, any limitation of his commission and powers to the contrary notwithstanding; and in case of the death of any judge of probate or master in chancery pending a process of insolvency before him, the papers and proceedings in the case may be transferred to the successor of such judge of probate, or to any master in chancery in the same county, who shall have jurisdiction thereof, and may further proceed therein, in the same manner as though the said process had been instituted before him.

Adjournments.

SEC. 16. All courts and meetings, by this act provided to be held by a judge of probate or master in chancery, may be adjourned, in case of his absence, by the clerk. (103)

(103) This section was repealed by the act of 1846, c. 168, § 2; that section also gives the clerk power to adjourn meetings.

SEC. 17. All acts and parts of acts, inconsistent with the provisions of this act, are hereby repealed.

ACT PASSED MARCH 18, 1846. CHAPTER 122.

AN ACT CONCERNING BONDS GIVEN ON DISSOLVING ATTACHMENTS.

Approval of Bonds. — Notice.

BEFORE any bond shall be approved pursuant to the twentieth section of the one hundred and sixty-third chapter of the statutes of the year eighteen hundred and thirty-eight, the person whose goods or estate shall be attached, or some one in his behalf, shall make application in writing to some one of the justices of the Supreme Judicial Court, or Court of Common Pleas, for that purpose, which application shall contain the names and places of residence of the person or persons to be proposed as surety or sureties; and notice shall be given to the plaintiff in the action on which the attachment shall be made, or his attorney, of the time and place of hearing upon such application, and the same time shall be given and notice shall be served in the manner provided in the ninety-fourth chapter of the Revised Statutes for notice to the adverse party of the time and place of taking depositions: *provided, always*, that the attaching creditor, or his attorney, may in writing waive such notice, or consent to an approval of any such bond before the expiration of the aforesaid time.

ACT PASSED MARCH 30, 1846. CHAPTER 168.

AN ACT IN ADDITION TO "AN ACT FOR THE RELIEF OF INSOLVENT DEBTORS, AND FOR THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS."

Proceeding against a Party concealing Property of the Debtor.

SEC. 1. Every judge of probate or master in chancery, in their respective counties, before whom any matter may be pending, in relation to any insolvent estate, under the act for the relief of insolvent debtors, and for a more equal distribution of their effects, passed in the year one thousand eight hundred and thirty-eight, chapter one hundred and sixty-three, upon complaint made under oath by any person interested in said estate, against any one suspected of having fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate of such insolvent, may cite such suspected person to appear before him, and to be examined on oath upon the matter of such complaint; and if the person so cited shall refuse to appear and submit to such examination, or to answer such interrogatories as shall be lawfully propounded to him, the said judge or master may commit him to the common jail of the county, there to remain in close custody until he shall submit to the order of said court or master; and all such interrogatories and answers shall be

in writing, and shall be signed by the party examined, and filed in such probate court or with such master, to be used in any proceeding before such court or master, pending against said insolvent, or in any way or manner authorized by law. (104)

(104) The Supreme Judicial Court has jurisdiction, under § 18 of the act of 1838, to revise the decision of a judge of probate, master in chancery, or commissioner of insolvency, refusing to issue a citation under this section. *Harlow* v. *Tufts*, 4 Cush. 448.

The provisions of this section are not limited to the investigation of actual fraud, — cases where the property of the insolvent has been obtained without any consideration, — but were intended to enable creditors to discover and pursue property which has been so withdrawn from the assets of the insolvent that it cannot be made applicable to the satisfaction of the general debts to which it ought to be applied under the insolvent law. *Harlow* v. *Tufts*, 4 Cush. 448.

Fraudulent conveyances of real estate are within the provisions of this section. *Harlow* v. *Tufts*, 4 Cush. 448.

Provision for Courts of Insolvency repealed.

SEC. 2. The first, second, and sixteenth sections of the act in further addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects, passed in the year one thousand eight hundred and forty-four, chapter one hundred and seventy-eight, are hereby repealed; *provided*, that nothing in this act contained shall affect the proceedings at any meetings of creditors or other meetings already called; and provided, further, that, in case of absence of the master in chancery or judge of probate at any meeting, such meeting may be adjourned by the clerk.

Returns to Secretary of State.

SEC. 3. The several judges of probate and masters in chancery in the Commonwealth shall, on or before the

tenth day of each and every month, make returns to the Secretary of the Commonwealth, containing the names of the persons who, during the next preceding month, have petitioned or been proceeded against before him as insolvent debtors, under the act of the year one thousand eight hundred and thirty-eight, chapter one hundred and sixty-three, and the acts in addition thereto since enacted; also the residence and occupation of such persons, with the date when such proceedings were commenced by or against them. And it shall be the duty of the Secretary to enter the same in a book, convenient for reference, which shall be open to the inspection of the public.

Notice of Meetings.

SEC. 4. It shall be the duty of the judges of probate and masters in chancery to order the assignee to give written notice, by mail or otherwise, of all meetings of creditors of insolvent debtors, and of all dividends, in cases pending before them, to all known creditors of such insolvent debtors. (105)

(105) By the act of 1850, c. 319, personal or written notice need not be given to creditors, unless specially required, of any meeting of creditors except the first. This act of 1850 was repealed by the act of 1851, c. 307, § 4, which was itself repealed by the act of 1852, c. 185, § 1.

When this Act to take effect.

SEC. 5. This act shall take effect from and after its passage.

ACT OF CONGRESS, PASSED MARCH 14, 1848.

AN ACT TO MAKE ATTACHMENTS WHICH ARE MADE UNDER PROCESS ISSUING FROM THE COURTS OF THE UNITED STATES CONFORM TO THE LAWS RESPECTING SUCH ATTACHMENTS IN THE COURTS OF THE STATES.

Attachments from Courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, upon process instituted in any of the courts of the United States, property shall hereafter be attached to satisfy such judgment as may be recovered by the plaintiff in such process, and any contingency occurs by which, according to the laws of a State, such attachment would be dissolved upon like process pending in or returnable to the State courts, then such attachment or attachments made upon process issuing from or pending in the courts of the United States within such State shall be dissolved, the intent and meaning of this act being to place such attachments in the courts of the States and the United States upon the same footing: *provided*, that nothing herein contained shall interfere with any existing or future law giving priority in payments of debts to the United States.

ACT PASSED MAY 3, 1848. CHAPTER 252.

AN ACT RELATING TO ACTIONS AGAINST ASSIGNEES OF INSOLVENT ESTATES.

When Assignees are liable out of their own Estate.

No action shall be brought to charge an assignee under any of the insolvent acts of this Commonwealth, to answer in damages out of his own estate, upon any special promise, unless the promise, contract, or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by such assignee, or by some person thereunto by him legally authorized.

ACT PASSED MAY 8, 1848. CHAPTER 267.

AN ACT IN RELATION TO COSTS IN CASES OF BANKRUPTCY AND INSOLVENCY.

Costs, where Insolvency is pleaded.

WHENEVER, in the courts of this Commonwealth, the defence is made to rest on a discharge in bankruptcy or insolvency alone, and an issue is made up, in writing, to that effect, and found for the defendant, he shall, in all such cases, recover his costs from and after such joinder of issue.

ACT PASSED MAY 10, 1848. CHAPTER 304.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Commissioner.

SEC. 1. The Governor, with the advice and consent of the Council, shall appoint and commission some suitable person, in each county, to be a commissioner of insolvency, in the county for which he is appointed, who shall hold his office for the term of seven years, unless sooner removed by the Governor and Council. (106)

(606) By the act of 1851, c. 322, the Governor is authorized to appoint two additional commissioners in each county; and by the act of 1852, c. 112, still another in Worcester County.

Commissioners' Oath of Office.

SEC. 2. Said commissioners, before entering upon the duties of their office, shall take and subscribe the oaths or affirmations required to be taken by persons appointed to civil office by the Governor, with the advice and consent of the Council, under the constitution and laws of the Commonwealth.

Jurisdiction of Commissioners.

SEC. 3. Said commissioners shall have and exercise all the jurisdiction, power, and authority that judges of

probate and masters in chancery now have and exercise, under and by virtue of the several acts to which this act is in addition; and all the provisions in said several acts contained shall apply, in like manner, to said commissioners, respectively, as they apply to judges of probate and masters in chancery, except so far as said provisions, or any of them, may be by this act modified or repealed.

Commissioners' Court.

SEC. 4. Said commissioners shall hold a court of insolvency, in their respective counties, at the shire towns thereof, on the first Tuesday of every month, and at such other times and places, within their respective counties, as they may severally appoint, at which said courts the like proceedings may be had, as provided by the several acts, to which this act is in addition, in relation to meetings appointed by judges of probate and masters in chancery. In case the commissioner shall be interested in any question pending before him, it shall be the duty of the clerk to make a certificate of such fact in the record of the case; and thereupon the judge of probate for the same county shall have jurisdiction of the case in which such question may have arisen; and shall hear and determine the same; and shall receive such compensation therefor as said commissioner would have received for the like services. (107)

(107) By the act of 1852, c. 291, § 1, this section, so far as it requires courts to be held in the shire towns, is repealed.

Commissioners to account for their Fees.

SEC. 5. The said commissioners shall severally, on or before the first Wednesday of January, of each year, render to the Treasurer of the Commonwealth a true and just account of all fees received by them respectively; and if

the fees so received by any commissioner, except the travelling fees, as herein after provided, shall exceed the sum of fifteen hundred dollars, the excess shall be accounted for and paid, by said commissioners, into the treasury of the Commonwealth. (108)

(108) By the act of 1851, c. 349, § 3, this section, so far as it requires commissioners to account to the Commonwealth, is repealed.

Return of Warrant.

SEC. 6. All warrants shall be returnable, at any time, not less than ten nor more than sixty days from the issuing of the same.

Fees of Commissioners.

SEC. 7. Each commissioner shall receive, for travel in the performance of any official duty under this act, the same fees that are now prescribed by law for justices of the peace, in the discharge of their official duties.

Schedule of Creditors.

SEC. 8. The schedule of creditors, heretofore required by law to be produced by an insolvent debtor at the first meeting of his creditors, shall be presented by him to the messenger, within three days after the date of the warrant, and the messenger shall return the same at the first meeting; and the messenger, in addition to the publications now required by law, shall send written notice to the creditors named on the said schedule, of the time and place of the first meeting of the creditors of such insolvent debtor; and whenever it shall appear to the commissioner that such notice has not been given, he shall forthwith adjourn the meeting, to the end that the foregoing requisition may be complied with.

Assent of Creditors. — Discharge.

SEC. 9. No insolvent debtor, whose assets do not pay fifty per cent. of the claims proved against his estate, shall receive a discharge under this act, or the acts to which this is in addition, unless a majority, in number and value, of his creditors who have proved their claims, shall assent thereto, in writing, within six months after the date of the assignment; and in no case shall a certificate of discharge be granted until the third meeting of the creditors of such debtor, nor at any time, except at a meeting of the creditors; and such discharge shall be null and void if the debtor, or any person in his behalf, shall have procured the assent of any creditor thereto by any pecuniary consideration. (109)

(109) In case of the insolvency of a partnership, a partner whose separate estate pays fifty-five per cent. on his separate debts is entitled to his discharge from them, although the joint estate does not pay fifty per cent. of the partnership debts, without the assent of creditors, as required by this section. *Baker, Appellant*, 4 Law Reporter, N. S. 388, 7 or 8 Cush., S. J. C. Worcester, 1851.

In the Matter of Macy, 5 Law Reporter, N. S. 21, it was decided by the Supreme Judicial Court, that an appeal taken by the assignee from the allowance by the commissioner of the claim of a creditor, vacates the proof, and that in such case the assent of the creditor to the debtor's discharge is of no effect. But by the act of 1852, c. 293, the effect of the assent of such creditor is made to depend upon the result of the appeal.

Debts for Necessaries.

SEC. 10. No discharge of an insolvent debtor, under this act and the acts to which this is in addition, shall bar any claim for necessaries furnished to such debtor, or to his family, unless such claim shall have been proved against his estate.

Appeal from Granting a Discharge.

SEC. 11. The assignee, or assignees, of any insolvent debtor may appeal from the decision of the commissioner granting a certificate of discharge to such insolvent debtor; and the like proceedings shall be had as in the case of an appeal by the insolvent debtor whose discharge has been refused.

Removal of Assignee.

SEC. 12. Whenever it shall appear to any commissioner, upon the complaint of any person interested in any insolvent estate, pending before the said commissioner, that the assignee of such estate has fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate of the insolvent debtor, or has been interested in any suit at law in relation to the said estate, for the purpose of securing to himself a preference or priority over the other creditors, or has in his possession or control any portion of the said estate, with the intent to appropriate the same unlawfully to his own use, or has been guilty of any fraudulent act in relation to the said estate, it shall be lawful for the said commissioner, after due notice, to remove the said assignee, and appoint another in his place, who shall have the same powers that are now conferred upon the assignees of insolvent estates by the law of this Commonwealth, and all the estate of the insolvent debtor shall vest in the new assignee so appointed; and in all cases the commissioner may require the assignee of any insolvent case pending before him to give good and sufficient bonds for the faithful performance and discharge of his duty. (110)

(110) The power of removal is further extended by the act of 1851, c. 349, § 2. See act of 1853, c. 116, as to assignees' bonds.

Stay of Proceedings.

SEC. 13. Whenever any creditor of an insolvent estate, who has proved his debt, shall present his petition to the commissioner before whom such estate is pending, requesting a stay of the proceedings, it shall be lawful for the said commissioner, after due notice to all persons interested in the estate, and a hearing of the matter, to pass an order, vacating all the proceedings in the case: *provided*, that no objection is made by such insolvent debtor, or by any creditor who shall have proved his debt.

Oath of Creditor.

SEC. 14. No debt shall be proved or allowed against any insolvent estate, unless the creditor shall make oath to the validity of the claim, which oath shall be in substance as follows, namely: — "I, , do swear that , of , by (or against) whom proceedings in insolvency have been instituted, at and before the date of such proceedings was, and still is, justly and truly indebted to me in the sum of , for which sum, or any part thereof, I have not, nor has any other person to my use, to my knowledge or belief, received any security or satisfaction whatever, beyond what has been disposed of agreeably to law. And I do further swear, that the said claim was not procured by me for the purpose of influencing the proceedings in this case." Said oath may be administered by any justice of the peace, where the creditor resides more than *five* miles from the place of meeting of the creditors. (111)

(111) By the act of 1851, c. 189, § 1, the oath required by this section may be administered by a justice of the peace when the creditor is unable to attend. Where a debt is contracted by the agent or consignee of a foreign creditor, the proof and oath may be made by such agent or consignee. Act of 1851, c. 349, § 1.

And by the act of 1852, c. 189, §§ 1, 2, where a creditor is prevented from proving his claim, proof may be made by agent, who is required to make oath that, to the best of his knowledge and belief, the allegations required to be made in the oath of the creditor are true.

Sale by the Messenger.

SEC. 15. Whenever it shall appear, to the satisfaction of any commissioner who has issued a warrant to take possession of the estate of an insolvent debtor, that such estate, or any part thereof, is of a perishable nature, or likely to deteriorate in value before an assignee can be legally appointed, the commissioner may order the same to be sold in such manner as he may deem expedient, under the direction of the messenger, who shall hold the funds received in the place of the estate so disposed of.

Jurisdiction of Judges of Probate and Masters in Chancery.

SEC. 16. The fourth section of the one hundred and seventy-eighth chapter of the statutes of the year one thousand eight hundred and forty-four, and so much of the several acts, to which this act is in addition, as gives jurisdiction to judges of probate and masters in chancery, in cases of insolvency, and all other provisions in said several acts, inconsistent with the provisions of this act, are hereby repealed.

Cases not affected by this Act.

SEC. 17. This act shall not affect any case in insolvency now commenced, or that shall be hereafter commenced, before this act shall take effect, and the judge of probate or master in chancery, before whom any such cases may be pending at the time this act shall take effect, shall have the same jurisdiction, power, and authority, in respect to them, as they now have.

ACT PASSED APRIL 18, 1849. CHAPTER 116.

AN ACT CONCERNING PROCEEDINGS IN INSOLVENCY.

Confirmation of unauthorized Proceedings.

ALL proceedings instituted in any case in insolvency, before any commissioner of insolvency in this Commonwealth, between the sixth day of June and the sixth day of July, in the year one thousand eight hundred and forty-eight, so far as the same may want effect or validity by reason that such commissioner was not duly commissioned, or by reason that such commissioner was not duly sworn or qualified under his commission, are hereby confirmed, and the same shall be taken and deemed good and valid in law to all intents and purposes whatsoever.

ACT PASSED FEBRUARY 18, 1850. CHAPTER 27.

AN ACT CONCERNING BONDS TO DISSOLVE ATTACHMENTS.

Bonds to be approved by Masters in Chancery.

SEC. 1. The masters in chancery in the several counties shall perform the duty of approving bonds to dissolve attachments, heretofore incumbent on the justices of the

Supreme Judicial Court or the justices of the Court of Common Pleas.

Fees of Master in Chancery.

SEC. 2. The fee shall be one dollar for the hearing and decision, and fifty cents for the citation, in each case, and if the attachment is dissolved, such sums shall be taxed in the defendant's costs when he shall be the prevailing party in the suit in which such attachment was made.

ACT PASSED MARCH 20, 1850. CHAPTER 97.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Attachments.

WHENEVER, under the provisions of the "Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," and the several acts in addition thereto, a discharge has been, or shall be, granted to any person, the property or estate of such person, by him acquired subsequently to the time of the first publication of the notice of the issuing of the warrant in said case, shall not be subject to attachment, by trustee process or otherwise, in any suit to recover any debt which may have been provable under said act, and due to any person or persons not resident in this State at the time of such first publication, or founded on any contract existing at the time of said first publication, and made or to be performed out of the limits of this Commonwealth.

ACT PASSED APRIL 15, 1850. CHAPTER 207.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Where a Commissioner is unable to perform his Duties.

SEC. 1. In case the commissioner of insolvency for any county, before whom any proceedings may be pending in insolvency, shall die, or shall from any cause be absent, or unable at any time to perform any of the duties required of him, the same duties may be performed by the judge of probate of said county, in the same manner, and with the same effect, as in case of the performance of similar duties by said commissioner of insolvency.

SEC. 2. This act shall take effect from and after its passage.

ACT PASSED APRIL 18, 1850. CHAPTER 218.

AN ACT CONCERNING TAXES ASSESSED ON ESTATES OF INSOLVENT DEBTORS.

Of Taxes.

TAXES assessed upon the estates of insolvent debtors, and unpaid at the time of the assignment, other than taxes assessed by the Commonwealth, shall not be recovered as preferred claims.

ACT PASSED MAY 3, 1850. CHAPTER 319.

AN ACT CONCERNING NOTIFICATIONS OF CREDITORS OF INSOLVENT ESTATES.

Notice to Creditors.

THAT at all meetings of creditors of insolvent estates, except the first, personal or written notice need not be given to the creditors, unless thereto specially required, by an order of the commissioner of insolvency, before whom the case is pending. (112)

(112) This act was repealed by the act of 1851, c. 307, § 4, which was itself repealed by the act of 1852, c. 185, § 1.

ACT PASSED MAY 15, 1851. CHAPTER 138.

AN ACT TO REGULATE THE PUBLICATION OF ADVERTISEMENTS ISSUED UNDER THE AUTHORITY OF PROBATE JUDGES AND COMMISSIONERS OF INSOLVENCY.

Publication of Legal Notices.

SEC. 1. All persons having business at the several probate offices, and at the several offices of the commis-

sioners of insolvency of this Commonwealth, shall have the right of selecting such newspapers as they may prefer and name, for the publication of all legal notices which may be ordered, under their application, by the several judges of probate and commissioners of insolvency: *provided*, that if, in the judgment of any judge of probate or commissioner of insolvency, the newspaper thus selected shall be deemed insufficient to give due publicity to any such notice, the said judge of probate or commissioner of insolvency shall have the right of ordering the publication of the said notice in one other paper.

When this Act to take Effect.

SEC. 2. This act shall take effect from and after its passage.

ACT PASSED MAY 20, 1851. CHAPTER 189.

AN ACT IN FURTHER ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Proof of Debts.

SEC. 1. The oath required by the fourteenth section of the three hundred and fourth chapter of the acts of the year one thousand eight hundred and forty-eight, may be administered by any justice of the peace, when the creditor shall be unable to attend before the commissioner, by reason of sickness or other cause.

Attachments.

SEC. 2. If any person, whose goods or estate are attached on mesne process, in any civil action founded on contract, for the sum of one hundred dollars or upwards, shall not, within seven days from the return day of the writ, dissolve the attachment in the manner referred to in the nineteenth section of the one hundred and sixty-third chapter of the statutes of the year one thousand eight hundred and thirty-eight, any creditor may proceed against such person in the manner provided in the said act.

Relief against Accident or Mistake.

SEC. 3. Whenever any person shall, by accident or mistake, have failed to dissolve an attachment, made as aforesaid, he may forthwith apply, by petition to the commissioner before whom proceedings against him are pending, for a stay of the said proceedings, and after said notice to the petitioning creditor as such commissioner shall order, or without notice, if the urgency of the case shall not allow notice to be given, the said proceedings may be stayed by an order of such commissioner until a hearing; and if, upon the hearing before such commissioner, such person shall prove to his satisfaction that he is in fact solvent, or that for any other cause such proceedings ought to be stayed, the said commissioner shall thereupon order the proceedings aforesaid to be suppressed and finally stayed.

ACT PASSED MAY 24, 1851. CHAPTER 307.

AN ACT RELATING TO NOTICES OF PROCEEDINGS BEFORE JUDGES OF PROBATE AND COMMISSIONERS OF INSOLVENCY.

SEC. 1. It shall be the duty of judges of probate to order every executor, administrator, trustee, or other party applying to them, in any matter requiring notice to be given to parties interested therein, to give written notice, by mail or otherwise, to all parties known to be interested, and not resident in the county in which such matter is pending, and whose residence is known to such executor, administrator, trustee, or other party; but the proceedings in such matter need not be arrested until such notice shall be given, if, in the opinion of such judge, the rights of the party to whom such notice has been ordered will not be injured by the progress of such proceedings.

SEC. 2. In case the party to whom such notice may have been ordered shall have an attorney or agent within the Commonwealth, written notice given to such attorney or agent shall be as effectual as if given to such party.

SEC. 3. It shall be the duty of commissioners of insolvency to order the assignee to give written notice, by mail or otherwise, of all meetings of creditors, and of all dividends to all known creditors.

SEC. 4. The three hundred and nineteenth chapter of the acts of the year one thousand eight hundred and fifty is hereby repealed. (113)

(113) This act was repealed by the act of 1852, c. 185, § 1.

ACT PASSED MAY 24, 1851. CHAPTER 322.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Additional Commissioners.

SEC. 1. The first section of the three hundred and fourth chapter of the General Laws of the Commonwealth, passed in the year one thousand eight hundred and forty-eight, is hereby so far amended, that the Governor, with the advice and consent of the Council, may appoint and commission, in addition to those already appointed and commissioned, one or more suitable persons in each county, so that the whole number shall not exceed three in any one county, to be a commissioner or commissioners of insolvency in the county for which he or they are appointed, who shall hold his or their office for the term of seven years, unless sooner removed by the Governor and Council; and the commissioners who may be so appointed shall have and exercise the same jurisdiction, power, and authority, and be subject to the same duties and requirements as the commissioners appointed under the said act, except that they shall not be required to hold a court of insolvency at the shire town of their respective counties, on the first Tuesday of every month.

SEC. 2. This act shall take effect from and after its passage.

ACT PASSED MAY 24, 1851. CHAPTER 349.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Proof of Debts.

SEC. 1. Whenever any creditor of any insolvent debtor resides in any foreign country, and the debt claimed by him is founded on any contract made by the debtor with the consignee or agent of such creditor, residing within the United States, the oath required by law to the validity of the claim may be made by such consignee or agent, instead of the principal creditor.

Removal of Assignees.

SEC. 2. Whenever any assignee or assignees of any insolvent estate shall remove from this Commonwealth, and shall unreasonably refuse or neglect to obey any lawful order of the commissioner for the calling of the meetings of the creditors, or the settlement of his accounts, or shall otherwise unreasonably refuse or neglect to discharge his duties as such assignee, the commissioner may, at his discretion, remove all or any such assignee or assignees, and may appoint one or more assignee or assignees in his or their place, and all the estate of the debtor, not before lawfully disposed of, shall be forthwith as effectually and legally vested in such new assignee or assignees, as if the

original assignment had been made to him or them; and the former assignee or assignees shall, on request, at the expense of the estate, make and execute to the new assignee or assignees, all such deeds, conveyances, and assurances, and do all such other acts and things, as may be necessary and proper to enable the new assignee or assignees to demand, recover, and receive all the said estate.

Fees of Commissioners.

SEC. 3. So much of the fifth section of the three hundred and fourth chapter of the statutes of eighteen hundred and forty-eight as requires the several commissioners of insolvency, if the fees received by them respectively in each year shall exceed the sum of fifteen hundred dollars, to account for and pay the excess into the treasury of the Commonwealth, be, and the same is hereby, repealed.

SEC. 4. So much of the acts to which this is in addition, as is inconsistent herewith, is hereby repealed.

ACT PASSED APRIL 20, 1852. CHAPTER 112.

AN ACT FOR THE APPOINTMENT OF ONE ADDITIONAL COMMISSIONER OF INSOLVENCY FOR THE COUNTY OF WORCESTER.

Commissioner in Worcester County.

THE first section of the three hundred and twenty-second chapter of the General Laws of the Commonwealth, passed in the year one thousand eight hundred and fifty-one, is hereby so far amended, that the Governor, with the

advice and consent of the Council, may appoint and commission, in addition to those already appointed and commissioned, one more suitable person for the county of Worcester, to be a commissioner of insolvency in said county, who shall hold his office for the term of seven years, unless sooner removed by the Governor and Council, and the commissioner who may be so appointed shall have and exercise the same jurisdiction, power, and authority, and be subject to the same duties and requirements, as the commissioners appointed under the three hundred and fourth chapter of the General Laws of the Commonwealth, passed in the year one thousand eight hundred and forty-eight, except that he shall not be required to hold a court of insolvency at the shire town of said county, on the first Tuesday of every month.

ACT PASSED MAY 5, 1852. CHAPTER 185.

AN ACT RELATING TO NOTICES OF PROCEEDINGS BEFORE JUDGES OF PROBATE AND COMMISSIONERS OF INSOLVENCY.

SEC. 1. The act entitled "An Act relating to Notices of Proceedings before Judges of Probate and Commissioners of Insolvency," passed in the year one thousand eight hundred and fifty-one, is hereby repealed.

SEC. 2. No title to real estate depending upon any orders made by judges of probate, or commissioners of insolvency, since the passage of said act, shall be affected by reason of any failure or omission to comply with the requirements thereof.

ACT PASSED MAY 7, 1852. CHAPTER 189.

AN ACT IN ADDITION TO THE SEVERAL ACTS "FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS."

Proof of Debts.

SEC. 1. In case any creditor of an insolvent debtor shall be disabled, by absence from the Commonwealth, sickness, or in any other manner, from proving his claim, such claim may be proved by any agent or attorney of such creditor acting in his behalf, in such manner as shall be satisfactory to the commissioner.

Agent's Oath.

SEC. 2. Instead of the oath required by the provisions of an act entitled "An Act in Addition to the several Acts for the Relief of insolvent Debtors, and the more equal Distribution of their Effects," passed in the year one thousand eight hundred and forty-eight, such agent or attorney shall make oath, that, to the best of his knowledge and belief, the allegations in said section required to be sworn to are true. And the commissioner may require such further proof, and hear such further evidence in relation to the truth of said allegations, as he shall deem expedient.

Papers filed in a Case.

SEC. 3. Where any bill of exchange, promissory note, or other instrument which has been used as proof of a debt against the estate of an insolvent debtor, has been or shall be returned into the probate office in any county, the register of probate may deliver such bill, note, or other instrument to the person who proved such debt, on such person's filing in the probate office a copy of such bill, note, or instrument, attested by the said register; and it shall be the duty of said register, before giving up any such paper, to make a memorandum upon it, stating the name of the party against whose estate it has been proved, and the amount of any dividend which may have been declared on the same, and the time when it was declared; *provided*, further, that nothing herein contained shall make it necessary for any creditor, proving a claim against the estate of any insolvent, to leave the proofs of his claim with the commissioner.

ACT PASSED MAY 20, 1852. CHAPTER 291.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS.

Commissioners' Courts.

SEC. 1. So much of the fourth section of the three hundred and fourth chapter of the statutes of one thousand eight hundred and forty-eight as requires the commissioners of insolvency appointed under said act to hold a court in the shire town of their respective counties on the first Tuesday of every month, is hereby repealed.

Counsel in Insolvency.

SEC. 2. No person shall act as counsel or attorney in any case pending before a commissioner of insolvency in which such person is clerk.

What incapacitates a Commissioner.

SEC. 3. No commissioner of insolvency shall act as such for any person or persons in any case or cases, if he has previously been employed as counsel or attorney for such person or persons in regard to any matters which will be affected by proceedings in insolvency.

Penalty.

SEC. 4. If any person shall be guilty of a violation of the provisions of this act, he shall forthwith be removed from his said office of clerk or commissioner, as the case may be.

ACT PASSED MAY 20, 1852. CHAPTER 293.

AN ACT IN ADDITION TO THE SEVERAL ACTS FOR THE RELIEF OF INSOLVENT DEBTORS.

Who may assent to a Discharge.

ANY creditor who has proved his claim before any commissioner of insolvency may signify his assent in writing to the discharge of the insolvent debtor, notwithstanding an appeal from the allowance of his claim may be pending; and such assent, if made within the time prescribed by law, shall have the same effect as if no appeal had been taken, provided such claim shall be finally allowed, and not otherwise.

ACT PASSED APRIL 1, 1853. CHAPTER 116.

AN ACT IN ADDITION TO THE SEVERAL ACTS "FOR THE RELIEF OF INSOLVENT DEBTORS, AND THE MORE EQUAL DISTRIBUTION OF THEIR EFFECTS."

When Assignees shall give Bond. — Provision in Case they do not.

In any case pending under the acts to which this is in addition, whenever any creditor, who shall have proved his claim, shall so request, in writing, filed with the commissioner before whom the proceedings shall be, such commissioner shall require an assignee to give good and sufficient bond for the faithful performance and discharge of his duty, to be approved by such commissioner, and filed, and to enure for the purposes, and to be enforced, as already provided in respect to bonds to such commissioners, in the eleventh section of the one hundred and seventy-eighth chapter of the acts of the year eighteen hundred and forty-four. And if such assignee shall fail to give such bonds, within such time as the commissioner shall order, not exceeding ten days after notice to him from such commissioner of such requirement, it shall be the

duty of such commissioner to remove such assignee, and to appoint another in his place, who shall have all the like powers of an assignee of the estate as the person so removed might have had, had he continued assignee.

INSOLVENT CORPORATIONS ACT.

ACT PASSED MAY 24, 1851. CHAPTER 327.

AN ACT TO SECURE THE EQUAL DISTRIBUTION OF THE PROPERTY OF INSOLVENT CORPORATIONS AMONGST THEIR CREDITORS.

SEC. 1. Any corporation created by a law of this Commonwealth may apply, by petition signed by any officer duly authorized by a vote of a majority of the corporators present and voting at a legal meeting called for such purpose, to the commissioner of insolvency for the county where such corporation has its principal place of business, setting forth its inability to pay its debts, and its willingness to assign all its estate and effects for the benefit of its creditors, and praying that such proceedings may be had in the premises, as in this act are provided; and the said commissioner shall thereupon forthwith, by warrant under his hand and seal, directed to the sheriff or either of his deputies, in the said county, as messenger, command them and any of them to take possession of all the estate, real and per-

Petition of corporation. St. 1838, c. 163, § 1. St. 1848, c. 304.

sonal, of such corporation, excepting such as may be exempt from attachment, and of all the deeds, books of account, and papers of such corporation, and to keep the same safely until the appointment of assignees as hereinafter provided.

Messenger to publish notice of warrant;

SEC. 2. The said messenger shall forthwith give public notice, by advertisement in such newspapers as shall be designated by the commissioner, and also such personal or other notice to any persons concerned as the commissioner shall prescribe, which notice shall state that a warrant has issued against the estate of such corporation, and that the payment of any debts, and the delivery of any property belonging to such corporation, to it or for its use, and the transfer of any property or the making of any contract by it, are forbidden by law; and the messenger shall, in the same notice, call a meeting of the creditors of such corporation, to prove their debts, and to choose one or more assignees of the estate; which meeting shall be held at some convenient time and place, to be designated in the warrant, the time to be not less than ten days, and not more than sixty days, after the issuing of the warrant. And if such estate, or any part thereof, shall be perishable, the same may be sold, under the direction of the messenger, in like manner as in cases of individual insolvent debtors. And the messenger, in addition to the publications above required, shall send written notice to the creditors named on the schedule of creditors presented by the corporation, of the time and place of the first meeting of the creditors of such insolvent corporation; and whenever it shall appear to the commissioner that such notice has not been given, he shall forthwith adjourn the

to call a meeting of creditors; St. 1838, c. 163, § 2. St. 1843, c. 304, § 6.

and give notice to each creditor. St. 1845, c. 304, § 8.

meeting, to the end that the foregoing requisition may be complied with. And the said commissioner shall attend the said meeting, and shall allow all the debts that shall be duly proved before him, and shall cause a list thereof to be made, which shall be certified by himself, and shall be recorded and filed with the other papers and proceedings in the case. And the creditors shall then proceed, in the presence of the said commissioner, to choose one or more assignees of the estate of the corporation; the choice to be made by the greater part in value of the creditors, according to the debts then proved: *provided*, that when the number of creditors shall amount to five and be less than ten, the votes of two at least shall be necessary for a choice; and when the number of creditors shall amount to ten or more, the votes of three, at least, shall be necessary for a choice. And in case no choice shall be made by the creditors at said meeting, the said commissioner shall appoint one or more assignees. And in case any assignee so chosen shall fail to express, in writing, his acceptance of the trust within four days, the commissioner may fill any vacancy occasioned thereby.

Choice of assignees. St. 1838, c. 163, § 2.

SEC. 3. All debts due and payable from such corporation, at the time of the first publication of the notice of issuing the said warrant, and all the claims for damages against any railroad or turnpike or canal corporation, may be proved and allowed against its estate, assigned as aforesaid; and all debts then absolutely due, although not payable until afterwards, may be proved and allowed as if payable presently, with a discount or rebate of interest, when no interest is payable by the contract, until the time when the debt would

Debts provable. St. 1838, c. 163, § 3.

Contingent debts.

become payable; and all moneys due from such corporation on any bottomry or respondentia bond, or on any policy of insurance, may be proved and allowed, in case the contingency or loss should happen before the making of the last dividend,* in like manner as if the same had happened before the said first publication of the said notice; and in case the corporation shall be liable for any debt in consequence of having made or indorsed any bill of exchange or promissory note before the first publication of the said notice, or in consequence of the payment, by any party to any bill or note, of the whole or any part of the money secured thereby, or of the payment of any sum by any surety of the corporation, in any contract whatsoever, although such payment in either case shall be made after the said first publication, provided it be made before the making of the last dividend* such debt shall be considered, for all the purposes of this act, as contracted at the time when such bill or note or other contract shall have been so made or indorsed, and may be proved and allowed as if the said debt had been due and payable by the said corporation before the said first publication; and all demands against the corporation for or on account of any goods or chattels wrongfully obtained, taken, or withheld by such corporation, may be proved and allowed as debts, to the amount of the worth of the property thus taken; and no debt other than those above mentioned shall be proved or allowed against the estate assigned as aforesaid. And when it shall appear

Debts for conversion of goods.

* The *first* dividend is made the period of limitation by the general insolvent law.

that there has been mutual credit given by the corporation and any other person, or mutual debts between them, the account between them shall be stated, and one debt shall be set off against the other, and the balance of such account, and no more, shall be allowed or paid on either side respectively. Set-off.

And when any creditor shall have any mortgage or pledge of any real or personal estate of the corporation, or any lien thereof, for securing the payment of any debt claimed by him, the property so held as security shall, if he require it, be sold, and the proceeds shall be applied towards the payment of his debt, and he shall be admitted as a creditor for the residue thereof, if any, and such sale shall be made in such manner as the commissioner shall order; and the creditor and the assignee respectively shall execute all such deeds and papers as may be necessary or proper for effecting the conveyance. And if the creditor shall not require such sale, and join in effecting the conveyance as aforesaid, he may release and deliver up to the assignees the premises so held as security, and he shall thereupon be admitted as a creditor for the whole of his said debt. And if the said property shall not be either sold or released and delivered up as aforesaid, the creditor shall not be allowed to prove any part of his said debt. Collateral security.

SEC. 4. The said commissioner shall require proof on oath or affirmation, of the creditor, in substance the same as is now required by law of creditors of individual insolvent debtors, of any debt claimed before him, and may examine the party claiming the same, or the agent who shall present the claim in his behalf, and also any Proof on oath. St. 1838, c. 163, § 4. St. 1848, c. 304, § 14. St. 1851, c. 189, § 1; c. 349, § 1. St. 1852, c. 189, §§ 1, 2.

officer of such insolvent corporation, on their respective oaths or affirmations, on all matters relating to such claim. And any supposed creditor, whose claim shall be wholly or in part rejected by the commissioner, may appeal from his decision, and have the said claim determined at law; and if the debt demanded shall exceed the sum of three hundred dollars, such appeal shall be heard and determined in the Supreme Judicial Court, otherwise in the Court of Common Pleas; and the appeal shall be entered in the proper court, which shall be first held within or for the county in which the proceedings are had, next after the expiration of fourteen days from the time of claiming the appeal; but no such appeal shall be allowed unless the same be claimed and notice thereof be given to the commissioner or his clerk, to be entered on the record of the proceedings, and also to the assignees or one of them, within ten days after the decision appealed from. And, upon entering such appeal, the creditor shall file in court a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, and the assignees shall plead or answer thereto in like manner; and the like proceedings shall be had upon the joining of any issue of fact or law, and also upon the nonsuit or default of either party, as in any action for the same cause commenced and prosecuted in the usual manner; excepting only that no execution shall be awarded against the assignees for the amount of the debt, if any, recovered by the creditor. And if the assignees shall be dissatisfied with the allowance of any claim by the commissioner, they may appeal from his decision and have such claim determined at

Appeal by creditor;

by assignees.

law; and such appeal shall be claimed, notified, heard, and determined, in like manner, and the like proceedings shall be had thereon, in all respects, as are before prescribed in the case of an appeal by a creditor; and, in both cases, the final judgment of the court appealed to shall be conclusive in the premises: *provided, however*, that any party aggrieved by the judgment of the Court of Common Pleas, upon any matter of law arising upon the trial of such appeal, may except thereto in the manner provided in the eighty-second chapter of the Revised Statutes, and the judgment in such cases being certified to, the said commissioner shall ascertain the amount, if any, due to the claimant; and the list of debts shall be altered, if necessary, to conform thereto. And the party prevailing in such suit shall be entitled to costs, to be taxed and recovered as in common actions, against the adverse party, which costs, if recovered against the assignees, shall be allowed to them out of the estate of the corporation.

Assignment. St. 1838, c. 163, § 5.

SEC. 5. The said commissioner shall, by an instrument under his hand and seal, assign and convey to the person or persons chosen or appointed assignees as aforesaid, all the estate, real and personal, of the corporation, except such as may be by law exempt from attachment, with all its deeds, books, and papers relating thereto; which assignment shall vest in the assignees all the property of the corporation, both real and personal, which it could by any way or means have lawfully sold, assigned, or conveyed, or which might have been taken in execution on any judgment against the corporation, at the time of the first publication of the notice of issuing the above-mentioned warrant, although the same

Effect of.

may then be attached on mesne process as the property of the said corporation; and such assignment shall be effectual to pass all the said estate, and dissolve any such attachment, made after this act shall take effect; and the said assignment shall also vest in the said assignees all debts due to the corporation, or to any person for its use, and all liens and securities therefor, and all its rights of action for any goods or estate, real or personal, and all its rights of redeeming any such goods or estate; and the assignees shall have power to redeem all mortgages, conditional contracts, pledges and liens, of or upon any goods or estate of the corporation, or to sell the same, subject to such mortgage or other encumbrance. And the corporation, and any officer thereof as the case may require, shall likewise, at the expense of the estate, make and execute all such deeds and writings, and indorse all such bills, notes, and other negotiable papers, and draw all such checks and orders for moneys deposited in banks or elsewhere, and do all such other lawful acts and things, as the assignees shall at any time reasonably require, and which may be necessary or useful for confirming the assignment so made by the said commissioner, and for enabling the assignees to demand, recover, and receive all the estate and effects assigned as aforesaid, especially such part thereof, if any, as may be without this Commonwealth; and the assignees shall have the like remedy to recover all the said estate, debts, and effects, in their own names, as the corporation might have had if no such assignment had been made.

Attachments dissolved by.

Corporation to do acts to confirm.

Assignee may sue.

Suits not to abate.

And if, at the time of such assignment, any action shall be pending in the name of the cor-

poration, for the recovery of any debt, or other thing, which might or ought to pass to the assignees by the said assignment, the assignees shall, if they require it, be admitted to prosecute such action in their own names, in like manner and to the like effect as if the same had been originally commenced by them as such assignees; and no suit pending in the name of the assignees shall be abated by the death or removal of any assignee, but, upon the motion of the surviving or remaining assignee, or of the new assignees, as the case may be, he or they shall be admitted to prosecute the suit in like manner, and to the like effect, as if the same had been originally commenced by him or them. And in all suits, prosecuted by the assignees, for any debt, demand, right, title, or interest due or belonging to the insolvent corporation, the assignment made to them by the commissioner shall be conclusive evidence of their authority to sue as such assignees.

Assignee may sell franchise.

SEC. 6. In the case of any railroad, turnpike, canal, bridge, or other corporation, authorized by law to take toll, such assignment shall be deemed to empower the assignees to sell and convey the franchises of such corporation, and any and all property and rights connected with the exercise of such franchises, to such persons as may become the purchasers thereof, and by virtue of such sale and conveyance, such purchasers and their associates shall be deemed to be so far the owners of all such franchises, that they may have such corporation organized anew by themselves, as its sole members, in the manner pointed out in the third section of the forty-fourth chapter of the Revised Statutes, and the other provisions of

Rights of purchasers.

law applicable to such corporation; and when such corporation shall have been thus organized anew, it shall be deemed to be lawfully possessed, as of its property, of all the franchises to such corporation previously granted, and of all the property and rights so sold and conveyed with such franchises as aforesaid, and such purchasers, and their associates, successors, and assigns, shall be deemed to be the only members of such corporation; and when such corporation shall have been so organized anew, it shall not be liable to any suit at law or in equity founded on any contract performable within this Commonwealth, or made with any citizen thereof, which existed prior to such organization, nor to any claim provable under this act.

Messenger to take all estate. St. 1838, c. 163, § 6.

SEC. 7. The messenger shall, as soon as may be after his appointment, demand and receive from the corporation, and from all other persons, all the estate in its or their possession respectively, which is herein above ordered to be assigned, with all the deeds, books of account, and papers of the corporation, relating thereto; and the corporation shall deliver to the messenger such part of the said estate, and other things above specified, as may then be within its possession or power, and each and all the officers of such corporation shall disclose the situation of such parts thereof as may then be in the possession of the corporation, or any other person or persons, so as to enable the messenger to demand and receive the same. And the treasurer, or other principal financial officer of such corporation, shall also make a schedule containing a full and true account of all its creditors, with the place of residence of each creditor, if known to

Schedule of creditors. St. 1848, c. 304, § 8.

him, and the sum due to each. And the said schedule shall also set forth the nature of each debt, whether founded on written security, on account, or otherwise, and also the true cause and consideration thereof, and a statement of any existing mortgage, or other collateral security, given for the payment of the same, which schedule the corporation shall present to the messenger within three days after the date of the warrant, and the messenger shall return the same at the first meeting of its creditors, to be delivered to the assignees who shall then be chosen. And the said corporation shall present, at the first meeting of the creditors, a schedule of all its real and personal estate, giving a description of the same, and stating where it is situated, such schedule to be delivered to the assignees. And each and every officer of the corporation shall, at all times, upon reasonable notice, attend and submit to an examination, on oath, before the commissioner, and the assignees, upon all matters relating to the disposal of its estate, and to its trade and dealings with others, and its accounts concerning the same, and relating to all debts due or claimed from it, and to all other matters concerning its estate, and the due settlement thereof according to law; such examination to be in writing, when so required by the commissioner, and to be signed by the person examined, and filed with the other proceedings; and the commissioner shall have the same power to imprison any person disobeying any order lawfully made respecting such examination, as he now has in cases of individual insolvent debtors.

Schedule of estate. St. 1841, c. 124, § 2.

Officers to submit to examination. St. 1838, c. 163, §§ 6, 23.

SEC. 8. The commissioner shall appoint a second meeting of the said creditors, to be held

Second meeting of creditors.

St. 1838, c. 163, § 7. at such time, not more than three months after the date of the warrant to the messenger, as the commissioner shall think fit, regard being had to the distance at which the creditors, or any of them, may reside, at which meeting any creditors, who have not before proved their debts, shall be allowed to prove the same. And the

Corporation to amend schedule. corporation shall then be allowed to amend the schedule of its creditors, and to correct any mistake therein. And the president, directors, treasurer, clerk, and other officers of the corporation, if any, shall then severally make and subscribe an oath before such commissioner, which shall be certified by him, and filed in the case, in substance as follows: —

Officers to take the oath.

Form of oath. St. 1838, c. 163, § 7. I, ———, (president, &c., or treasurer, &c.,) do swear, that I do verily believe the account of the creditors of the said corporation, contained in the schedule signed by A. B., and now in the hands of the assignees chosen by the creditors of such corporation, is, in all respects, just and true; that I do verily believe that all the property and estate of the said corporation, and all its books of account and papers, have been delivered to the messenger or the said assignees; and that, if any goods or estate, not so delivered, shall hereafter come to my knowledge, I will faithfully and diligently apprise the said assignees thereof. And I do further swear, that, to the best and utmost of my knowledge, information, and belief, there is no part of the estate or effects of the said corporation made over or disposed of in any manner in fraud of this act, or of the creditors of the said corporation.

Void transfers of property. Sec. 9. If any such corporation, being insolvent, shall, within six months before the filing of

a petition by or against it, make any payment, or any assignment, sale, transfer, or conveyance of any part of its estate, real or personal, to any preëxisting creditor having reasonable cause to believe such corporation insolvent, such payment, assignment, sale, transfer, or conveyance shall, as to the other creditors, be void; and the assignees may recover the money or property, or the value thereof, from the creditor so receiving the same. St. 1838, c. 163, § 10. St. 1841, c. 124, § 3.

SEC. 10. The assignees shall forthwith cause the said assignment to be recorded in the registry of deeds in each county in the Commonwealth, in which there may be any real estate of the corporation, upon which the same may operate; and shall also give public notice of their appointment, in such manner as the commissioner shall order; and shall demand and receive from the messenger, and from all other persons, all the estate in his or their possession, respectively, which shall have been assigned, or intended to be assigned, according to the provisions of this act; and they shall sell all the said estate, real and personal, which shall come to their hands, on such terms as they shall think most for the interest of the creditors; and shall keep a regular account of all moneys received by them as assignees, to which every creditor shall, at all reasonable times, have free resort. And the assignees shall, as soon as may be after receiving any moneys belonging to the estate, deposit the same in some bank, in their names as assignees, or otherwise keep the same distinct and apart from all other moneys in their possession; and they shall likewise, as far as practicable, keep all the goods and effects belonging to the estate separate and apart from all other

Assignees to record assignment; St. 1838, c. 163, § 11.

give notice of their appointment; St. 1851, c. 138.

keep accounts;

deposit moneys in bank;

goods in their possession, or designated by appropriate marks, so that all such moneys, goods, and effects belonging to the estate may be easily and clearly distinguished from other like things in the possession of the assignees, and may not be exposed, or liable to be taken as their property, or for the payment of their debts. And they shall be allowed, and may retain, out of the moneys in their hands, all the necessary disbursements made by them in the discharge of their duty, and a reasonable compensation for their services, at the discretion of the commissioner. And the assignees shall have power, under the direction of the commissioner, to submit any controversy that shall arise in the settlement of any demands against the estate of such corporation, or of debts due to its estate, to the determination of one or more arbitrators, to be chosen by the assignees and the other party to such controversy; and the assignees shall likewise have power, under the direction of the commissioner, to compound and settle any such controversy, by agreement with the other party thereto, as they shall think proper, and most for the interest of the creditors. And it shall be in the power of the creditors, by such a vote as is provided in the second section of this act for the choice of assignees, at any regular meeting called by order of the commissioner for that purpose, which meeting may be called by the commissioner, at his discretion, and shall be called by him upon the application of a majority of the said creditors, either in number or value, to remove all or any of the assignees; and upon such removal, or upon any vacancy by death or otherwise, to choose one or more assignees in his or

to retain for services;

submit to arbitration.

compound controversies;

may be removed.

their place; and all the estate of the corporation, not before lawfully disposed of, shall be forthwith as effectually and legally vested in such new assignee or assignees, as if the original assignment had been made to him or them; and the assignee or assignees, and his or their executors or administrators, shall, upon the request and at the expense of the estate in the hands of the new assignee or assignees, make and execute, to him or them, all such deeds, conveyances, and assurances, and do all such other lawful acts and things, as may be needful or proper to enable the new assignee or assignees to demand, recover, and receive all the said estate. And when only one assignee shall be originally appointed, or when by death or otherwise the number shall be reduced to one, all the provisions in this act contained, in reference to several assignees, shall apply to such one.

Case of one assignee only.

SEC. 11. The assignees shall, at such time as shall be appointed by the commissioner, within six months from the time of their appointment, call a meeting of all the creditors of the corporation, by a notice to be published in such manner as the commissioner may direct, at which meeting the creditors who have not before proved their debts shall be allowed to prove the same; and the assignees shall produce to the commissioner, and the creditors then present, fair and just accounts of all their receipts and payments touching the estate of the corporation, and shall, if required by the commissioner, be examined on oath as to the truth of such accounts; and the said commissioner shall thereupon make an order, in writing, under his hand, for a dividend of the said estate and effects, or of such part thereof

Third meeting of creditors. St. 1838, c. 163, § 12. St. 1844, c. 278, §§ 4, 7.

Assignees to account under oath.

First dividend.

as he shall think fit, among such of the creditors of the said corporation as shall have proved their debts, in proportion to their respective debts, which order shall be recorded with the other proceedings in the case: *provided, however,* that all debts due by the corporation to the United States, or to any persons, who, by the laws of the United States, or of this Commonwealth, are or may be entitled to a priority or preference with respect to such debts out of the estate assigned as aforesaid, shall have the benefit of such priority or preference in like manner as if this act had not been passed. And if, at the time of ordering such dividend, it shall appear to the commissioner probable that there are just claims against the estate, which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, the commissioner shall, in ordering such a dividend, leave in the hands of the assignees a sum sufficient to pay to every such absent creditor a proportion equal to what shall then be paid to the other creditors, which sum shall remain thus unappropriated in the hands of the assignees, until the final dividend shall be declared, or until the commissioner shall order its distribution.

Privileged debts.

Funds to be reserved.

Second dividend. St. 1838, c. 163, § 13. St. 1844, c. 278, § 7.

SEC. 12. The said assignees shall, at such time as shall be appointed by the commissioner, within eighteen months after the appointment of the assignees, make a second dividend of the said estate, in case the same was not wholly distributed upon the first dividend, and shall give notice of a meeting, for that purpose, of all the creditors of the corporation, in such manner as the commissioner shall direct, at which meeting the creditors, who have not before proved their

debts, shall be allowed to prove the same; and the accounts of the assignees shall then be produced and examined, as provided in the preceding section, and shall be settled by the commissioner, and whatever sum, upon the balance thereof, shall appear to be in their hands, shall, by a like order of the commissioner, be divided among all the creditors who shall then have proved their debts, in proportion to their respective debts: *provided*, that no creditor whose debt shall be proved at the time of the second or any after dividend, shall be allowed to disturb any prior dividend; but he shall be paid so far only as the funds, remaining unappropriated in the hands of the assignees, shall be sufficient therefor.

Sale of debts, &c.

And if, at the time of appointing the meeting for the said second dividend, there shall remain in the hands of the assignees any outstanding debts or other property due or belonging to the estate, which cannot, in the opinion of the commissioner, be collected and received by the assignees without unreasonable or inconvenient delay, the assignees may, under the direction of the commissioner, sell and assign such debts or other property in such manner as shall be ordered by the commissioner.

Second dividend to be final, unless

And such second dividend shall be final, unless any suit relating to the estate be then depending, or any part of the estate be outstanding, or unless some other estate or effects of the said corporation shall afterwards come to the hands of the assignees, in which cases another dividend shall be made, by the order of the commissioner, in the manner before provided; and further dividends shall be made in like manner as often as

occasion shall require; and, at every regular meeting of the creditors, those who have not before proved their debts shall be allowed to prove the same.

Surplus. And if, after the payment of all debts proved as aforesaid, any surplus shall remain in the hands of the assignees, the same shall be paid or reconveyed to, and revest in, the corporation or its legal representatives.

Clerk. St. 1838, c. 163, § 14. SEC. 13. The commissioner, at the commencement of the proceedings in each case under this act, shall appoint a clerk, who shall be sworn to the faithful discharge of his duty; and the clerk shall keep a record of all the regular meetings of the creditors, and of all the proceedings thereat, and shall preserve all papers duly filed in the course of the proceedings, and perform such other duties appertaining to his office as shall be prescribed by the commissioner.

Record. And the record of the proceedings in each case, with all the papers filed therein, shall be inclosed together, and, at the termination of the proceedings, shall be deposited in the probate office of the county, and be there preserved under the care of the register of probate. And the commissioner may remove the clerk for any cause that he shall deem sufficient; and upon such removal, or upon the death, resignation, or absence of the clerk, may appoint another in his place. And copies of all parts of the said record, duly certified by the register of probate, shall, in all cases, be admissible as evidence, *primâ facie*, of the facts therein stated and contained.

Commissioners to preside at meetings; SEC. 14. The commissioner shall attend and preside at all the meetings of the creditors, and shall regulate the proceedings thereat; and he

may adjourn any meeting, from time to time, as occasion shall require, and all things lawfully done at any such adjourned meeting shall be of the like force and effect as if done at the original meeting. He shall also have the power to administer all oaths that shall be required in the course of the proceedings. In case the commissioner shall be interested in any question pending before him, it shall be the duty of the clerk to make a certificate of such fact, in the record of the case; and, thereupon, the judge of probate for the same county shall have jurisdiction in the case in which such question may have arisen, and shall hear and determine the same; and shall receive such compensation therefor as the said commissioner would have received for the like services. And any creditor, who shall reside more than five miles from the place of meeting of the creditors, being required to make oath in support of his claim, such oath may be administered by any justice of the peace, or other person duly qualified to administer oaths, in the place or country where such creditor may reside; and every creditor who has proved his debt may appear, vote, and act at all meetings of the creditors, by his attorney, duly constituted, in like manner as if he were personally present.

to adjourn; administer oaths. St. 1838, c. 163, § 15. When the commissioner is interested. Oath of creditor.

SEC. 15. There shall be allowed and paid, out of the estate and effects of the corporation, the following fees for the respective services hereinafter mentioned; that is to say: to the commissioner, for receiving and allowing the original petition, and issuing his warrant thereon, two dollars; and the sum of five dollars for every day during which he may be employed in this duty, to be apportioned among the several

Fees to the commissioner.

causes, if there be more than one, on which he may act on the same day.

to the clerk; To the clerk, for every day's attendance upon or with the commissioner, on any business arising in such causes, a sum not exceeding two dollars per day, to be apportioned as aforesaid; and such further compensation for keeping a record of the proceedings, and for any other services performed by him, as the commissioner shall allow.

to the messenger; To the messenger, such compensation as the commissioner shall see fit to allow, according to the circumstances of each case, regard being had to fees allowed to sheriffs for like services.

to witnesses. St. 1838, c. 163, § 16. To every witness, the same fees as are or may be allowed to witnesses in the Court of Common Pleas.

Jurisdiction of S. J. C. St. 1838, c. 163, § 18. SEC. 16. The Supreme Judicial Court shall have a general superintendence and jurisdiction, as a court of chancery, of all cases arising under this act, and may, from time to time, make such general rules and forms as they shall judge necessary to establish and maintain a regular and uniform course of proceedings therein, in all the different counties; and they shall also have power, in all cases which are not herein otherwise specially provided for, upon the bill, petition, or other proper process, of any party aggrieved by any proceedings under this act, to hear and determine the case, as a court of chancery, and to make such order or decree therein as law and justice shall require; and all the powers granted in this section may be exercised either by the said court at any law term thereof, or by any one justice thereof, respectively, in like manner, in all respects, as other chancery powers vested

in the said court may by law be exercised, excepting the power of making general rules and forms as aforesaid, which latter power shall be exercised only at a law term of the said court.

Proceedings *in invitum*. St. 1838, c. 163, § 19. St. 1844, c. 278, §§ 9, 12, 13.

SEC. 17. If any corporation, whose goods or estate are attached on mesne process, in any civil action founded on a contract for the sum of one hundred dollars or upwards, which is in its nature provable under this act, shall not, within fourteen days from the return day of the writ, if the term of the court to which the process is returnable shall so long continue, or on or before the last day of the said term if the same shall sooner end, dissolve the attachment in the manner herein after provided, or if any corporation shall make any fraudulent conveyance or transfer of its property, or any part thereof, then any of its creditors whose claims, provable against its estate under this act, amount to the sum of one hundred dollars, may apply by petition, stating the facts and the nature of the said claim or claims, verified by oath, to the said commissioner, in the county in which the said corporation is established, praying that its estate may be seized and distributed according to law; and thereupon the said commissioner, after notice of the presentment of said petition, given to said corporation, by a copy thereof served on the president, treasurer, or clerk of said corporation, thirty days at least before the return day of such notice; and after a hearing before said commissioner, of the petitioners and corporation, or after default of said corporation to appear at the time and place in said notice appointed, if the facts set forth in said petition shall appear to said commissioner to be true, he shall forthwith issue his warrant to take possession of the estate

of said corporation, and such further proceedings shall be had as are provided, and may be necessary, for distributing the same among the creditors of such corporation, according to the intent of this act.

Stay of proceedings. St. 1851, c. 189, § 3.

And whenever any corporation shall, by accident or mistake, have failed to dissolve an attachment made as aforesaid, it may forthwith, and at any time before the said commissioner shall have issued his warrant as aforesaid, apply, by petition, to any justice of the Supreme Judicial Court for a stay of the said proceedings, and, after such notice to the petitioning creditor as such justice shall order, or without notice, if the urgency of the case shall not allow notice to be given, the said proceedings may be stayed by an order of such justice, until a hearing; and if, upon the hearing before such justice, the corporation shall prove, to his satisfaction, that it is in fact solvent; and if it shall not appear that such corporation has made any fraudulent conveyance of its property, the said justice shall thereupon order the proceedings aforesaid to be superseded and finally stayed; and nothing in this section contained shall be construed to control or diminish the equitable jurisdiction conferred by the fifteenth section of this act.

Bond to dissolve attachment. St. 1838, c. 163, § 20.

SEC. 18. Any corporation, whose goods or estate shall be attached on mesne process in any civil action, may, at any time within the time fixed by the preceding section, dissolve such attachment, by giving bond, with sufficient sureties, to be approved by the court in which the action is pending, or by any justice thereof, or by any justice of the Supreme Judicial Court, with condition to pay to the plaintiff in such action the amount, if any, that he shall recover

therein, within thirty days after the final judgment in such action; and no sureties shall be deemed sufficient for this purpose, unless they are satisfactory to the plaintiff in the action, or it shall be made clearly to appear that each of the sureties, if there are only two, is worth a sum equal to that for which the attachment is laid; or, if there are more than two sureties, that they are altogether worth twice the sum for which the attachment is laid, over and above what will pay all their debts.

Debts for labor privileged, St. 1838, c. 163, § 24.

SEC. 19. Any person who shall have performed any labor as an operative in the service of any insolvent corporation shall be entitled to receive, from the assignee of such insolvent corporation, the full amount of the wages due him for such labor, not exceeding twenty-five dollars, provided that such labor shall have been performed within sixty-five days next before the first publication of the notice of insolvency by the messenger; and such debts, and all claims against any railroad, turnpike, canal, or other corporation authorized to take land or materials, for damages for taking land or materials, or laying out such road, canal, or turnpike, shall be deemed to be preferred debts, next after debts due to the United States and to the Commonwealth.

and land damages.

Attachments to be preserved, when. St. 1841, c. 124, § 5.

SEC. 20. Should it appear to the commissioner that a dissolution of any attachment, pursuant to the provisions of the fifth section of this act, would prevent said attached property from passing to the assignees, the attachment, upon his order, shall survive, notwithstanding the provisions of the said section, and the assignees shall have power, with the permission of the

court to which said writ is returnable, to proceed with the suit against the insolvent to final judgment and execution, and the amount recovered, exclusive of costs, shall vest in the assignees.

Redemption. And in case any mortgage shall be foreclosed, pending the proceedings under this act, and before the appointment of any assignee, the assignees or assignee, when appointed, shall have the right to redeem the same at any time within sixty days after his or their appointment, with the like remedies as are now provided by law for the redemption of mortgages.

Costs, when privileged. St. 1841, c. 124, § 4.

SEC. 21. Whenever an attachment on mesne process is dissolved by virtue of proceedings under this act, if the claim upon which the suit was commenced shall be proved against the estate of the insolvent corporation, the plaintiff in such suit shall be allowed to prove against the said estate the legal fees, costs, and expenses of such suit, and of the custody of the property, and the amount thereof shall be considered a privileged debt, and have a priority or preference, and be paid in full, after the payment of those debts which have a priority or preference by virtue of the preceding provisions of this act.

Assignees to give bond. St. 1844, c. 278, § 11. St. 1848, c. 304, § 12. St. 1853, c. 116.

SEC. 22. The assignee or assignees, or any of them, if required by a majority in value of the creditors who have proved their claims, before entering on the duties of his or their said office, shall give bonds to the commissioner before whom the proceedings shall be pending, with sufficient surety or sureties, for the faithful performance of their duties. Said bonds shall be approved by the commissioner, by his indorsement thereon, and shall be filed with the record of the case, and enure to the benefit of all credi-

tors who may prove their claims, and may be prosecuted in the manner provided by law for the prosecution of bonds given to the judges of probate by administrators or executors. And, in all cases, the commissioner may require the assignee of any insolvent corporation, in any case pending before him, to give good and sufficient bonds for the faithful performance and discharge of his duty.

Concealment of property. St. 1846, c. 168, § 1.

SEC. 23. Upon complaint, made under oath by any person interested in the said estate, against any one suspected of having fraudently received, concealed, embezzled, or conveyed away any of the money, goods, effects, or other estate of such insolvent corporation, the commissioner may cite such suspected person to appear before him, and be examined on oath upon the matter of such complaint; and if the person so cited shall refuse to appear and submit to such examination, or to answer such interrogatories as shall be lawfully propounded to him, the said commissioner may commit him to the common jail of the county, there to remain in close custody until he shall submit to the order of said commissioner; and all such interrogatories and answers shall be in writing, and shall be signed by the party examined, and filed with the proceedings, to be used in any proceeding before such commissioner, pending against said insolvent corporation, or in any way or manner authorized by law.

Commissioners to make returns. St. 1846, c. 168, § 3.

SEC. 24. The several commissioners in the Commonwealth shall, on or before the tenth day of each month, make returns to the Secretary of the Commonwealth, containing the names of the corporations which, during the next preceding

month, have petitioned or been proceeded against before him as insolvent corporations under this act, specifying the kind of business for which such corporations were created, and the place or places where such business was principally done, with the date when such proceedings were commenced by or against such corporations. And it shall be the duty of the Secretary to enter the same in a book, convenient for reference, which shall be open to the inspection of the public.

Notice of meetings. St. 1846, c. 168, § 4.

SEC. 25. It shall be the duty of the commissioner to order the assignee to give written notice, by mail or otherwise, of all meetings of creditors of insolvent corporations, and of all dividends, in cases pending before them, to all known creditors of such insolvent corporations.

Exceptions.

SEC. 26. Nothing in this act contained shall be deemed applicable to any railroad or banking corporation, or to give validity to or affect any mortgage made by any corporation for any purpose whatever.

Sale of franchises, how to be made.

SEC. 27. Whenever any assignee or assignees shall proceed to sell the franchises of any corporation, by virtue of the provisions of the sixth section of this act, he or they shall, in case the commissioner of insolvency shall so order, expose the property, estate, or assets of said corporation for sale in shares, in number equal to the whole number of shares of the capital stock of such corporation, and such shares may thereupon be sold separately, and the purchasers of such shares may organize anew, in the manner in said section provided.

Act to take effect, when.

SEC. 28. This act shall take effect from and after the thirtieth day of September next.

COMMISSIONERS' REPORT,

MADE MAY 31, 1831.

To his Excellency, the Governor of the Commonwealth: —

The undersigned Commissioners, appointed by your Excellency, in pursuance of a resolve of the General Court, "to consider the expediency of providing by law for a more equal and equitable distribution of the estates of insolvent debtors; for the abolishing of imprisonment for debt, in all proper cases; and for making such further provision in the existing laws, touching debtor and creditor, as the said Commissioners might deem expedient and proper; and to report, by bill or otherwise, to the next General Court," respectfully report: —

That they have attended to the duty assigned to them by the said commission, and have prepared a bill for the purposes specified in the said resolve, which they respectfully present herewith.

They ask leave, at the same time, to submit for the consideration of the General Court a brief analysis of the bill, with a sketch of its practical operation, as anticipated by the Commissioners, and an exposition of some of the motives and considerations by which they have been influenced in their deliberations on the subject.

The first section of the bill points out the course to be pursued by an insolvent debtor who wishes to give up all his property to his creditors, and to obtain a discharge from his debts. The assignments by indentures, between a debtor and his creditors, which for several years past have been commonly resorted to for this purpose, are exposed to many inconveniences. No man is permitted by his own act to exempt his property from attachment, even for the purpose of dividing it among his creditors; and as he cannot do this whilst the property remains in his own possession, so he is prohibited from effecting the same object indirectly by an assignment of it to trustees. Such an assignment, though intended for the benefit of all the creditors, is liable to be defeated, either in part or in whole, at any time before it is acceded to by the creditors whose debts are equal to the whole value of the property assigned. And thus, whilst, on the one hand, these assignments seem inconsistent with the spirit of the laws which authorize attachment on mesne process, and, on the other hand, they are constantly resorted to in practice and seem almost to be considered in the community as part of our established law touching debtor and creditor, the citizen is perplexed by this undefined state of the law; and measures which in themselves are perfectly just and honest are liable to be embarrassed, and sometimes wholly defeated. Creditors are sometimes excluded who would gladly have taken their dividend and given the debtor a discharge; other creditors, by having an early opportunity to join in the assignment, or by a fortunate attachment before the assignment is completed, obtain more than their equal portion of the debtor's property; whilst the debtor himself remains undischarged as to all his creditors who have not become parties to the assignment, or who have not otherwise secured their whole demands. It is proposed by the present bill to legalize and facilitate assignments of this kind, and to render them more effectual both for debtors and creditors.

The first step in the proceedings is a petition by the debtor, setting forth his desire to surrender and assign all his property, in order to obtain a discharge from his debts, as provided in the bill. It is necessary, of course, to designate some magistrate or officer, to whom this petition shall be addressed, and who shall superintend and regulate the ulterior proceedings in the case; and as many of these duties are of a judicial character, it seems proper to appoint for this purpose men who are conversant with the principles and forms of judicial proceedings. It is accordingly proposed to assign this duty to the judges of probate, and the masters in chancery, in the several counties. As the proceedings are, in some respects, analogous to those in the probate court, upon the distribution of the estate of a deceased insolvent debtor, and the probate office will be found a safe and convenient depository for the records and papers, this duty seems therefore peculiarly appropriate to the judge of probate. But as the business would be liable to frequent interruptions, if there was only one officer in a county who could attend to it, and it would be burdensome to require all the inhabitants of a large county to repair to one place for this purpose, the masters in chancery are added, to act in all cases as the judge of probate might do.

One of the undersigned, being himself one of the present masters in chancery, felt some delicacy as to proposing an arrangement which might add to the emoluments of that office. But these scruples were overruled by his colleagues, who were of opinion that this accidental circumstance ought not to prevent their recommending the measure, which seemed in itself the best. It may also be observed, that the General Court, if they adopt the proposed system, can, if they think proper, authorize the appointment of commissioners of insolvency, to perform all the duties herein assigned to the judges of probate and the masters in chancery.

The bill, in prescribing the duties of the magistrate or officer, speaks only of the judge of probate, and then provides (in the seventeenth section) that all the same duties may be performed by masters in chancery. The undersigned, for the sake of avoiding useless repetitions, will adopt the like course in this report; meaning to include the masters in chancery with the judges of probate whenever the latter are mentioned.

The judge, upon receiving the petition, will immediately issue his warrant to some suitable person, authorizing him to take possession of all the estate of the debtor, excepting such as is by law exempted from attachment. This is the same duty that was assigned to the messenger, under the former bankrupt law of the United States, and this officer is accordingly so named in this bill.

There will undoubtedly be cases where the amount of debts and of property will be so small as not to justify the expense and trouble of these proceedings; and the Commissioners have accordingly proposed the sum of five hundred dollars of debts, as the limit in this respect. It will, of course, be for the wisdom of the Legislature to enlarge or reduce this sum.

The second section provides for a meeting of the creditors, to be held at such time and place as the judge shall order, for the purpose of proving their debts and choosing assignees of the debtor's estate. If the creditors, or many of them, live at a great distance from the place of meeting, the judge will of course give as long a notice as the law will permit; and when he thinks it expedient, will order notice to distant creditors by letters addressed to them, or by advertisements in the town or State where they reside; and if the assignees then chosen should be afterwards disapproved, they may be removed at any subsequent meeting, when more of the creditors may have had opportunity to prove their debts. The choice is given to the greater part in value of the creditors, on the principle that ques-

tions affecting property only ought to be decided with reference to the amount of property, and not to the number of the persons who hold it.

This section provides also for the first public notice of the issuing of the warrant; which is considered for many purposes as the commencement of the proceedings under the proposed law. It was necessary to fix some time at which the legal insolvency should be supposed to have occurred, and to which the assignment, and the debts to be discharged, should have relation. By the mode proposed in the bill, this time will always be susceptible of clear and unequivocal proof; and it will be made public, so as to put on their guard all who may have dealings with the insolvent debtor. This will prevent the inconvenience and injustice of avoiding contracts and other transactions with insolvent persons, as is done in some bankrupt laws, by relation back to a secret act of bankruptcy.

The proof and allowance of debts is one of the most important transactions under this bill, affecting materially the rights both of the debtor and the creditors, and the duty of the assignees. It is therefore required that a list of the debts shall be formally authenticated by the judge, and shall also be recorded at length with the proceedings in the case.

The third section describes the debts that may be proved. This bill includes some debts that are contingent, but which, from their peculiar character, have been thought proper to be included in other insolvent and bankrupt laws. Such are bottomry and respondentia bonds, and policies of insurance, provided the debts become absolute before the making of the first dividend. To these are added bills of exchange made or indorsed, and promissory notes indorsed by the debtor. If the debtor had been the acceptor of a bill, or the maker of a note, the debt would be provable, and he might be discharged from it, under the general pro-

visions of the bill; and it seems unreasonable to keep up a distinction between these and the former cases, upon grounds that are merely technical. In pursuance of the same principle, if the debtor is liable either as acceptor, maker, or indorser of any bill or note, and the money is paid by any party who is liable after him, the debt, though technically incurred only when this payment is made, is considered in the proposed law as contracted when the bill or note was made, accepted, or indorsed. So, if money is paid by a surety in any other contract, he is allowed to prove it as a debt, although paid after the commencement of the proceedings. The payment in the two last cases is required to have been made, and the contingency in the preceding cases is required to have happened, before the making of the first dividend, to entitle the claimant to prove the debt. It is necessary to fix a period for this purpose so early in the course of the proceedings, that the creditor in these cases may have opportunity to receive an equal dividend with others; and if it should be postponed to a later time than that proposed in the bill, he might be deprived of this opportunity, whilst his claim might nevertheless be barred by the certificate of discharge.

There are many cases where goods are delivered to a person as a carrier, factor, trustee, or bailee, for other purposes, and are afterwards so converted or misapplied by him as to render him liable for the value of them to the right owner. In such cases the owner may at his option bring an action on the contract, and recover the value or proceeds of the goods; or he may consider the other party as a wrong-doer, and bring an action against him for the tort. The claim considered in the first view would be provable as a debt; in the other it would not; and yet it seems absurd, as well as unjust, to let it depend on the will of the creditor, and on the form of action that he shall elect, whether his claim is provable or not under a law of this kind. The Commissioners have accordingly proposed

to consider all claims of this description as provable debts, entitled to a dividend, and liable to be barred, like those founded wholly on contract. They have proposed also to extend this provision to all cases, even of mere torts, where goods or any valuable property have been wrongfully obtained, taken, or withheld by the debtor; confining, however, the sum to be allowed against the estate to the amount to which the estate has been benefited, and that of the claimant injured. It is intended, of course, to exclude, not merely personal injuries, such as assaults and batteries, and slander; but also all injuries to the property of another which do not benefit the wrong-doer. Thus if a man should wantonly or carelessly burn or destroy his neighbor's property, the damage would not be provable as a debt; but if he should take the same property and convert it to his own use, the owner would be considered as a creditor for the value of the property.

The provision in this section respecting mutual credits, and also that respecting creditors who may hold security for their debts, are founded on principles of equity and justice, which have been recognized in similar cases by judges and by legislators.

The fourth section prescribes the manner in which debts shall be proved before the judge; and provides for an appeal to a jury by either party who may be dissatisfied. These provisions are taken substantially from the existing law relating to the estates of insolvent persons who are deceased. The principal difference is, that this bill allows a direct appeal to the Supreme Court, when the demand is of a kind that might be ultimately carried to that court; and that it authorizes the creditor to present his claim for adjudication, by a declaration to be filed with the clerk, and without the delay and expense of bringing an action. The proceedings in other respects are substantially the same as in an action in the common form; and of course a new trial may be granted for any legal and sufficient

cause; it being the final judgment of the court, and not merely the verdict, that is to be conclusive in the case.

The fifth section provides for the assignment of all the estate of the debtor, excepting such as may be exempted from attachment. This assignment includes every species of property which the debtor could in any way sell or dispose of for his own benefit, although it should be so situated that it could not be attached; and it also includes all the estate, real or personal, which might be attached as the property of the debtor, although he could not convey it; such as estates conveyed by the debtor with intent to defraud his creditors.

The assignment here proposed supersedes all attachments, existing on the day of the first publication of the notice. Attachments of goods and estate on mesne process, as practised in this State, are unknown to the common law, and equally so, as it is believed, in most of the United States. It may sometimes be proper and convenient, especially with regard to transient persons, to allow their creditors to attach their property, and prevent their carrying it beyond the reach of our laws; and this may be very just, as between the debtor and creditor. But as between the creditors themselves, there seems to be no reason why any one should by such an attachment gain any preference or advantage over the others. They all trusted alike to the same fund, and if it is insufficient for them all, they should share it equally. The principle on which the property of bankrupts and insolvent debtors is divided among their creditors, in all the systems of jurisprudence with which we are acquainted, is, that, as soon as it is made apparent that the debtor cannot pay all his creditors, no one of them shall be paid in full to the injury of the others. This is the principle adopted by our own laws in the case of deceased persons, whose estates are insolvent; and it is introduced in the bill now proposed, as a most essential part of the system, and a provision which is in-

dispensable in a law proposing to secure the rights and interests of creditors as among themselves. In cases of this kind it is most emphatically true that "equality is equity."

This assignment is evidenced and authenticated by the deed which is to be executed by the judge, but it will be in truth effected by the operation of the law; like the case of the estate of a deceased intestate, of which administration is granted by the judge. But as the assignment may not be recognized in other States or countries where there may be debts or other property of the debtor, it is proposed that he should execute all such conveyances, powers of attorney, or other instruments, and do such other acts, as the assignees may require, to enable them to demand and receive all his estate and effects, wheresoever they may be found. And also as to property within this State, although it would be effectually assigned without any confirmation by the insolvent, yet deeds from him may sometimes be convenient; particularly in the case of real estate, where such deeds would aid in tracing the title at any after time; and it is accordingly provided that the debtor shall make them whenever required by the assignees.

This section also contains provisions for commencing and conveniently prosecuting actions by the assignees; and directions for continuing the proceedings in case of the debtor's dying before they are concluded.

The sixth section requires the debtor to deliver up all his estate; and to make out, and produce at the first meeting of the creditors, a schedule of the names of his creditors, with the amount and nature of the debt due to each. This will be useful as evidence in the proof and allowance of debts, though not conclusive, either for or against any claimant.

The same section requires the attendance of the debtor at other times, to be examined on oath before the judge

and the assignees, and fixes his compensation therefor. It also provides an allowance out of his estate for the support of himself and his family, for such time as he may be supposed to be occupied in the settlement of his estate, and unable to engage in any other business for his support.

The seventh section prescribes the form of an oath to be taken and subscribed by the debtor, stating that he has delivered up all his estate; and that, if any thing more should come to his knowledge or possession, he will disclose or deliver it to the assignees; the section then provides for the certificate of discharge, which is to be granted to the debtor by the judge, upon its appearing to his satisfaction that the debtor has done every thing required of him by the law; and unless it is objected to by one half of the creditors in number or in amount. In other bankrupt and insolvent laws, it has been usual to require the express assent of a certain proportion of the creditors to the allowance of the certificate of discharge; by which means all who are absent, or are by any accident prevented from signing the certificate, are counted among the opposers of it. By the proposed method, no one will be considered as opposed to the discharge but those who are willing openly to express their objections; and the unfortunate debtor and his friends will be saved the labor, sometimes a humiliating one, of applying to each creditor to solicit his signature.

It has been usual also, in other codes of this kind, to require the assent of two thirds of the creditors to the certificate of discharge. It has been thought, however, that the assent of one half ought to be deemed sufficient for that purpose.

This section also describes the nature and effect of the discharge; which it is proposed to make as extensive as it can be consistently with the Constitution of the United States. The relief proposed is of two kinds, either an ab-

solute and total discharge of the debt, or an exemption of the person of the debtor from imprisonment for it. The latter, being merely a part of the remedy, and not affecting the right, is not supposed to be controlled by the Constitution; and it is accordingly proposed to grant this exemption to the certificated debtor, as to all his debts which are provable under this law, whether actually proved or not. The absolute discharge applies, first, to all debts of whatever description that are actually proved in the case; because the creditor, by voluntarily coming in under the law and taking the benefit of it, is presumed to assent to the conditions which it imposes. It applies, secondly, to all debts which are provable in their nature, and founded on any contract made after the act shall go into operation, provided the contract is made within this State, or is to be performed within it; and thirdly, to all debts that are provable, and founded on any contract made after the act shall go into operation, wherever the contract is made and wherever it is to be performed, provided the creditor is resident within this State at the time of the first publication of the notice mentioned in the second section. It also applies to those demands founded on torts, which are specified in the third section as provable debts; and includes all of this description, without reference to the time or place of their origin. It is supposed that demands of this kind do not come within that clause of the Constitution which prohibits the several States from passing any law impairing the obligation of contracts; and of course that the discharge may extend to all such demands without any limitation.

It is then provided that this discharge of the insolvent debtor shall not release any person who may be liable as a partner, joint contractor, or surety, for or with him. The twenty-first section contains provisions for proceedings against insolvent partners.

The eighth section allows to the debtor, whose certifi-

cate is refused, an appeal to the Supreme Judicial Court; and gives to that court full power to decide conclusively whether the certificate shall be granted. This superintending and controlling power, which is allowed in other similar codes, seems necessary to correct any error in judgment on the part of the judge of probate, or the master in chancery, and also to counteract the effect of any unjust prejudice, if any such should exist on the part of the creditors towards the debtor.

This section further provides for a short and simple plea by the debtor, if he should be afterwards impleaded. The general issue, which is well enough adapted to this purpose in actions of assumpsit, would be quite incongruous in an action on a bond, and wholly inadequate and improper in an action of debt on a judgment. It seemed therefore necessary to provide for a general plea of the discharge, to be resorted to when the general issue would not answer the purpose.

This eighth section also prescribes the allowance to be made to the debtor out of his estate. This kind of allowance, which is generally found in all bankrupt and insolvent laws, is granted, not merely from motives of humanity, but for reasons of policy also. It tends to induce a debtor whose situation is doubtful to look seasonably into his affairs, and not to proceed in a desperate course of speculation, at the risk and expense of his creditors, when there is no reasonable prospect of retrieving his fortunes.

The ninth section provides that the debtor, if in prison, may be brought out to be examined; and if that is not done, or if, from sickness or any other cause, he cannot attend personally, he may be examined wherever he may be, if within this State. Provision is also made for the case of his being out of the State, and unable to return and attend at the times prescribed in the bill; in which case, if he shall return as soon as it is in his power, and then do all the things required of him, he will be entitled to his discharge.

This section also provides for the discharge of the person of the debtor, if he should be in prison at the time of obtaining his certificate, for any debt that would be provable under this act. If he should meet with any obstruction in this respect, he might be relieved by the writ of habeas corpus, to which he would be entitled by the existing laws, without the necessity of any new provisions. The certificate is considered as *primâ facie* evidence, that the proceedings have all been legal and regular, and that the debtor is entitled to the full benefit of the act; and his arrest before obtaining his certificate does not show any intention on the part of the creditor to contest its validity. But this will not prevent the same creditor from arresting the debtor anew, upon execution for the same debt or otherwise, in like manner as any other creditor may arrest him, with a view to contest the validity of the certificate of discharge.

The tenth section provides, that the certificate, although formally granted and allowed, shall be wholly void, if it shall afterwards appear that the debtor has been guilty of certain specified acts, which are contrary to the spirit and design of the proposed law; and either of which, if seasonably known, would have been sufficient cause for withholding his certificate. These are, first, his wilfully swearing falsely as to any material fact in the course of the proceedings; secondly, his fraudulent concealment of any part of his estate; and thirdly, his giving, in contemplation of his insolvency, any security or payment to any creditor, indorser, or surety, with a view to give him any preference over the other creditors. This last provision is so explained as not to apply to any mortgage or other security demanded and received at the time of the original agreement, and as part of that agreement. Neither will it extend to any payment made in the usual course of business, nor to any security given on the demand of a creditor whose debt is due and unpaid, and not given with

a view to prefer that creditor, or to give him an undue advantage, although it should be known or believed at the time that the debtor was insolvent. This provision, which seems to be essential to every system of insolvent or bankrupt laws, is founded on the same principle of equity that is mentioned above in the remarks on the fifth section; namely, the perfect equality which ought to be enforced and maintained among all the creditors. It is opposed to a practice, which has become common in some parts of the State, of giving a preference in cases of insolvency to the friends of the debtor who have aided him with their credit, or with temporary loans. According to this practice, any friend of a young man who is commencing business, or of one whose credit is doubtful, will indorse his notes, or lend him money, and thereby give him a factitious credit, which induces others to trust him; and when the debtor can hold out no longer, he pays or secures this friend, and leaves to his other creditors what may be left, or the residue, of his effects. The frequency of this practice may exempt those who too easily yield to the example from the charge of intentional fraud or moral turpitude; but this does not alter the character of the transaction as it regards the other creditors; and as to them it has all the effects of a deliberate artifice and contrivance to defraud them of their money under false pretences.

In order the more effectually to repress this practice, the bill further provides that the creditor shall derive no advantage from the intended preference. For this purpose, it is proposed to render void as to the other creditors all such payments and securities; and they are accordingly put on the same ground with conveyances which are now by law considered fraudulent and void as to the creditors of the grantor. By the operation of this rule, the specific thing mortgaged or conveyed by the debtor, whether it be real or personal estate, may be recovered back by the assignees from the possession of the preferred creditor; but if he has

parted with it to any *bonâ fide* purchaser, the latter would hold it, and the creditors would be without remedy. So the case of a payment in money to any creditor, with a view to give him a preference, would not fall within the provision respecting fraudulent conveyances. The bill accordingly provides for these two cases, by enabling the assignees to recover the money, when money has been paid; and when any other property has been mortgaged or conveyed, to recover either the value of that property, or the property itself.

The bill also provides that the creditor who knowingly accepts such a preference shall not be entitled to any dividend on account of the debt so preferred; it being unjust that he should endeavor to secure an unfair and unlawful advantage over the other creditors, and when defeated in this purpose, come in upon the same terms with those whom he had attempted to defraud. This latter provision, being in the nature of a penalty on the creditor, does not apply unless he voluntarily joins in the meditated fraud, by accepting the payment or security, with knowledge of the purpose for which it is made. Such a preference will indeed very seldom be given, without his knowing the motive and object of it; but it may so happen; and in that case, although the property may be recovered back from him, it is not proposed that he should suffer any other loss or penalty.

The eleventh section describes the general powers and duties of the assignees, as to collecting and disposing of the estate and effects of the debtor, and fixes their compensation. It also authorizes them, under the direction of the judge, to compound and settle any controversies, or to submit them to arbitration. If, in any part of their duty, the assignees should proceed in a manner not approved by the creditors, they may be removed, and others appointed in their place.

To avoid the frequent repetition in the bill of the words

"assignee or assignees," they are generally spoken of in the plural number; and this section declares, that, when there is but one assignee, all the provisions having reference to several assignees shall apply to that one.

The twelfth section provides for the first dividend, which is to be made at furthest within six months after the appointment of the assignees. The judge will appoint the time, on application for that purpose by the assignees; and he will of course fix it earlier or later, within the limited period, according to the progress that shall have been made by the assignees in collecting and disposing of the estate; and also according to the places of residence of the creditors, giving to all of them, so far as can be done conveniently, an opportunity to prove their debts in season for the dividend.

The judge, in ordering this dividend, will always reserve enough of the estate to meet the claims of the creditors, if he has reason to suppose that there are any, who, from their distance, or any other cause, have not then proved their debts.

This section provides for all debts that are or shall be entitled to any priority or preference, by the laws of the United States or of this State; directing that they shall be paid, as if this act had not been passed.

The thirteenth section prescribes the time and manner of making the second dividend; which will generally be final, unless the business of the debtor shall have been very extensive, and his effects widely dispersed. Provision is however made for further dividends, when necessary; and if the assigned property shall be more than sufficient to pay all the debts, the surplus is to be restored to the debtor.

Whenever a dividend is to be made, and at all other regular meetings, creditors who have not before proved their debts are allowed to prove them; and in that case they are first to receive such dividend or dividends as the

others have already received, so far as it can be done out of the effects remaining in the hands of the assignees, and without disturbing any prior dividend.

This section also provides for the sale by the assignees of any outstanding debts or property that cannot be collected without great delay. The assignees, being entitled to a commission for their services, ought to exercise all reasonable care and diligence in getting in the effects; and should not be permitted, after receiving what is easily obtained, to sacrifice the remainder, in order to save trouble to themselves. It is accordingly provided that no sale of this kind shall be made without the direction of the judge. But, on the other hand, it will be for the interest of the creditors, as well as a relief to the assignees, to have the estate settled within a reasonable time, even at the risk of some small sacrifice in the disposal of doubtful, or distant, or contingent claims.

The fourteenth section provides for the appointment of a clerk, to keep a record of the proceedings, and to take care of all papers that may be used and filed in the case, and perform such other services as shall be prescribed by the judge. At the close of the proceedings in each case, he is to deposit the record and other papers in the probate office, under the care of the register of probate. The record may be kept in a book of such size and form as to be easily folded and inclosed with the other papers; and the whole may be so labelled as to make it easy in after time to refer to any case that may be wanted. Copies of the record, certified by the register of probate, are to be admissible as evidence, *primâ facie*, of the facts therein stated.

The fifteenth section requires the judge to preside at all meetings of the creditors, as there may always be creditors who wish to prove their debts; and also because questions may arise as to the right of voting, or as to the result of any vote, which ought to be decided by a disinterested person.

This section also provides for adjournments of meetings by the judge; and for the administering of all oaths and affirmations that may be required. It also allows absent creditors in certain cases, of whom an oath may be required, to make it before other magistrates; and allows all creditors to appear and act in all cases by attorney.

The sixteenth section establishes the fees to be allowed for the different services required by the act, so far as the nature and value of each service can be sufficiently ascertained; in other cases, the compensation is left to the discretion of the judge.

The seventeenth section makes the provision before adverted to, for authorizing any master in chancery to exercise all the power and authority previously given to the judge of probate. It is supposed that the number of masters in chancery that can be appointed under the existing law will be sufficient for the purposes of this act; but if it should turn out otherwise, the General Court can at any time increase the number, or can provide in any other way for a competent number of magistrates or officers to carry the law into execution.

It may often be convenient, and sometimes necessary, that the proceedings commenced before one of these officers should be carried on before another; and it is probable that there will seldom, if ever, be such a connection between the different stages of the proceedings as to cause any embarrassment from such a change of the presiding officer. This section accordingly provides for such a change, when it shall be found necessary or convenient. When the obstacle is temporary, and the officer who commenced the proceedings is ready to resume them, the one who took his place will of course be willing to retire, and leave the business to be concluded by the former.

The eighteenth section gives to the Supreme Judicial Court a general superintendence and jurisdiction of all cases arising under the act. It authorizes them to make

general rules for regulating the proceedings, and also to hear and determine particular cases that may be brought before them, by any party interested therein. This kind of appeal, in the last resort, to one tribunal, is necessary to insure a regular and uniform course of proceedings in all parts of the State; and the power is substantially the same as that which is vested in the same court in all matters arising in the probate courts. This power is of a kind that could not be exercised by a court proceeding according to the course of the common law; and it is accordingly provided in this section, that it shall be exercised according to the course in chancery.

The foregoing eighteen sections contain all the provisions that are proposed for the case of a voluntary surrender or assignment by a debtor who may wish to take the benefit of this act. The nineteenth section provides for a compulsory assignment of the estate and effects of any debtor whose conduct shows that he is unable or unwilling to pay his just debts. The facts which are designated as showing this state of the debtor's affairs are, first, his being arrested for a sum equal to fifty dollars, and not giving bail before the return day. The demand may be one that he denies to be just, and his refusal to pay it may therefore be no proof of his insolvency; but if he is compelled to lie in prison for want of bail, this not only shows that his mercantile credit is bad, but the confinement must prevent him from continuing and attending to his business. If it should be said, that a man in good circumstances may be arrested for an unjust and unfounded demand, and for so large an amount that he cannot find bail, the answer is, that the same injustice may be practised under the existing law, and the effects may be equally injurious. In both cases the remedy for the injured party is an action on the case for the malicious prosecution, in which he may recover whatever damages he shall prove that he has sustained.

The second fact which is considered as indicating an insolvency, or an unwillingness to pay his debts, is his lying in prison for more than thirty days, either on mesne process or execution, in any civil action for a sum equal to fifty dollars. This is founded on the same reason as the preceding.

The third is, the having his goods or estate attached on mesne process in any civil action for a sum equal to fifty dollars, and not dissolving the attachment on or before the return day, by giving security to pay what shall be recovered, in the manner provided in the succeeding section.

In either of the three cases above specified, any creditor who has a demand amounting to fifty dollars, which is then due and payable, may petition the judge of probate, or any master in chancery, and procure a warrant to be issued to take possession of all the estate of the debtor, in like manner as is provided in the first section; and all the subsequent proceedings for disposing of the estate and dividing it among the creditors are to be the same as if the original warrant had issued on the petition of the debtor himself.

There is no proviso in this case that the aggregate of the debts shall amount to five hundred dollars, as there is in the case of a voluntary assignment by the debtor. The reasons are, that the creditor who petitions in this case may not know, and will not generally have the means to prove, the amount of debts due from the debtor; and, secondly, the case that will authorize this petition cannot occur, unless there are at least two debts of not less than fifty dollars each; and this will seldom happen when the aggregate of the debts does not amount to five hundred dollars.

The twentieth section provides for dissolving an attachment on mesne process, by giving security to pay whatever shall be recovered in the action. This may, perhaps, be thought a convenient and reasonable regulation in itself, independently of its connection with the proposed

insolvent law. The only lawful or reasonable purpose to be answered by the attachment on mesne process under our laws is, to obtain security for the debt or damages that may be recovered in the suit. But it may be, and sometimes is, made an engine of oppression, by withholding from a defendant a ship, or merchandise, or other things that are necessary for carrying on his business. In such cases, the injustice might be prevented, and every allowable purpose of the attachment might be attained, by permitting the substitution of another satisfactory security for the debt.

In the twenty-first section, provision is made for proceedings against partners who become insolvent. The partners are considered, for many purposes, as one person, and their joint stock as the estate of one debtor; and their allowance on the net produce of their joint stock is accordingly computed on the amount of dividends paid to their joint creditors. But as to the separate estate and the separate creditors of each, they are considered in the same light as if there had been no partnership; and each individual is entitled to an allowance out of his separate estate, according to the amount of dividends paid to his separate creditors. As each partner is a debtor for all the joint debts, as well as for those due to his separate creditors, if he pays fifty per cent. on the whole, he is entitled to no more consideration than if he alone had been liable for the whole; and it is accordingly provided that he shall never receive more than the five hundred dollars, allowed in other cases. In marshalling the assets among the joint and several creditors, it is proposed to follow the existing law; and to distribute the property as it would be distributed upon different executions, against the partners collectively, and against each of them severally.

By the twenty-second section it is proposed to abolish imprisonment for any debt less than fifty dollars. This sum is proposed, as what was thought reasonable in itself,

and also as corresponding with other provisions in the bill now presented.

If the other parts of this bill should not be adopted, the undersigned would feel desirous to substitute, if possible, a total abolition of imprisonment for debt, or at least to provide that it should be allowed only for debts of a much greater amount than fifty dollars. But if every honest debtor can obtain his enlargement from prison upon the just and easy terms proposed in this bill, and if arrest for small debts is wholly prohibited, there will, it is believed, be little reason to complain of imprisonment for debt.

The bill now presented to the consideration of the Legislature, though apparently novel in some of its provisions, and complicated in its detail, will be found to rest upon two or three plain and familiar principles. The first is, that, when a debtor is unable to pay all his debts, his property ought to be equally divided among all his creditors. This principle is adopted, it is believed, almost universally by the commercial nations of Europe, as well as in many parts of the United States; and it is recognized and sanctioned by the laws of our own State, when the insolvent debtor is dead. There seems to be no reason, of justice or of policy, for adopting this principle of equality in the latter case, that does not apply with equal force whilst the insolvent debtor is still alive.

The second principle on which this bill is founded is, that when a debtor, without any fraud or gross misconduct on his part, is unable to pay all his debts, he ought to be discharged, upon surrendering all his property for the benefit of his creditors. The oppressive and disheartening sense of a liability for debts which a man is wholly unable to pay, tends to repress his exertions, or to render them fruitless, and thus to make him a useless member of society. The instances are rare of debtors who under such circumstances ever acquire enough afterwards to pay their old debts; and thus the operation of the existing law is

seldom of any advantage to the creditor, whilst it is injurious to the debtor, and to the community in which he resides. The bill makes the discharge of the debtor as extensive as is permitted by the Constitution of the United States; and it may be confidently anticipated, that, if the system goes into successful operation, those creditors who cannot be compelled to assent to the discharge of the debtor will find it for their interest to come in and prove their debts with the other creditors, which will operate as a voluntary discharge on their part.

Another important feature in this bill is that which relates to the dissolving of attachments on mesne process by substituting other satisfactory security for the payment of what may be recovered. This is not essential to the main object of the bill; and, if rejected by the General Court, would require only a corresponding alteration of a few words in the preceding section. It is, however, hoped that it will be considered to be in itself a reasonable and just provision, and a useful amendment of our law.

The other parts of the bill, voluminous as they appear, contain only the details of proceedings necessary for carrying into operation the two leading principles above mentioned. The Commissioners have endeavored to avoid that multiplicity and minuteness of details, which tend sometimes to render a law obscure and complicated, and to embarrass those who are charged with its administration; but they have thought it useful, on the other hand, in introducing a new system, to anticipate, and as far as possible to provide for, all the cases that will commonly occur under it. So far as they have succeeded in this attempt, the bill, instead of being more complicated, will be rendered more plain, intelligible, and easy in its operation, by the minuteness and particularity of its provisions.

The Commissioners ask leave to annex to this Report a sketch which they have prepared of some of the forms of proceeding under the proposed bill. They do not propose

that these forms should be adopted, nor in any manner sanctioned, by the Legislature; but wish to leave them to be modified as experience shall dictate to those who shall be intrusted with the administration of the law. They present them only with a view to exhibit more fully and distinctly the practical operation of the proposed system; and as tending to facilitate its introduction, if it should be established by the Legislature, and to promote uniformity in the practice under it.

CHARLES JACKSON,
SAMUEL HUBBARD,
JOHN B. DAVIS,
} *Commissioners.*

May 31*st*, 1831.

FORMS OF PROCEEDINGS.

Petition by a Debtor.

To J. M. W., Esquire, a Commissioner of Insolvency within and for the county of S.

Respectfully represents, I. D., of B., in the county of S., and Commonwealth of Massachusetts, merchant, (*or* of C., in the county of M., and Commonwealth of Massachusetts, merchant, that he has his usual place of business in B., in said county of S.;) that he is indebted in divers sums of money, amounting in the whole to two hundred dollars, which he is unable to pay in full; and that he wishes to surrender all his property for the benefit of his creditors, and to obtain his discharge from said debts according to the statute in this behalf provided: Wherefore he prays that a warrant may be issued to take possession of his estate, and that such further proceedings may be had in the premises as the law in such case prescribes.

May 2, 1853. I. D.

Memorandum and Certificate to be made or indorsed upon the Petition.

May 2, 1853. The foregoing (*or* within) petition was this day presented to me, J. M. W., a Commissioner of Insolvency in and for the county of S., and thereupon I issued a warrant, as by law prescribed, to D. S., deputy sheriff, as messenger in this case, to take possession of the estate of the said I. D., which warrant is returnable at my

office, in said B., on Wednesday, the twentieth day of May, present, at ten o'clock in the forenoon. And I have appointed L. C., of said B., to be clerk in this case.

J. M. W.

S—— ss. May 2, 1853. Personally appeared L. C., and made oath that he would faithfully perform the duties of clerk in this case.

Before me, J. M. W., Commissioner of Insolvency.

Petition by a Creditor.

To A. B., Esquire, a Commissioner of Insolvency within and for the county of M.

Respectfully represents, A. C., of B., in the county of S., and Commonwealth of Massachusetts, that I. D., merchant, has his place of residence in P., in the said county of M., and in the Commonwealth aforesaid, (*or*, on the first day of April last, had his place of residence in P., in the said county of M., and Commonwealth aforesaid; that he has not since had any other place of residence within said Commonwealth;) that your petitioner is a creditor of the said I. D.; that his claims are provable against the estate of the said I. D., under the act of said Commonwealth, entitled, " An Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," and the acts in addition thereto; that his said claims amount to more than the sum of one hundred dollars, and that the nature of his said claims is as follows, to wit:—

1. The amount due on a bill of exchange, drawn by one D. K., on the tenth day of November, in the year eighteen hundred and fifty-two, upon the said I. D., for the sum of five hundred dollars, made payable to your petitioner four months after the said date, and accepted by the said I. D., on which bill of exchange there was paid and indorsed the sum of two hundred dollars, on the fifteenth day of March, in the year eighteen hundred and fifty-three, leaving the sum of three hundred dollars and interest now due and owing on the said bill.

2. The amount of two bills of merchandise, sold by the said A. C. to the said I. D.; one on the first day of Octo-

ber, in the year eighteen hundred and fifty-two, to the amount of one hundred and twenty-two dollars; and the other on the ninth day of January, in the year eighteen hundred and fifty-three, to the amount of ninety-six dollars and seventeen cents; amounting, together, to the sum of two hundred eighteen dollars and seventeen cents due on book account.

And your petitioner further represents, that the said I. D., on or about the fifth day of April, in the present year, eighteen hundred and fifty-three, being insolvent, and knowing himself to be so, sold, conveyed, transferred, and delivered to one A. W., of said P., the whole stock of goods of the said I. D. in his store at said P., which your petitioner is informed and believes was of the value of at least two thousand dollars, on a credit of two years, and took therefor the notes of the said A. W., payable in two years from date without any further consideration, and without any security for the payment thereof, other than the said notes; that the said A. W. is not worthy of credit, and is not likely to be able to pay the amount of the said notes at maturity; and that the said I. D., since he made said sale and took said notes, has refused to transfer and indorse said notes, except without recourse to himself; and your petitioner believes and alleges that the said sale and conveyance was made with intent to defraud the creditors of the said I. D.

And your petitioner further represents, that the said I. D., on the sixth day of March last, made a conveyance to E. H. and J. H., of said P., copartners under the firm of H. and H., of the following described goods and estate, to wit: [*Here describe the goods and estate conveyed as accurately as may be;*] and that the said E. H. and J. H., at the time said conveyance was made, were creditors of the said I. D.; and your petitioner believes and alleges that the said conveyance was made in payment, or to secure the payment, of the preëxisting claims of the said E. H. and J. H. with intent to defraud the creditors of the said I. D. and to secure a preference to the said E. H. and J. H., the said I. D. being at that time insolvent, and the said E. H. and J. H. having reasonable cause to believe the said I. D. to be insolvent.

And your petitioner further represents, that, on the third day of said April, the said I. D. was the owner of certain

real estate, situated in said P., and that on said day all the real estate of the said I. D. was attached on a writ sued out of the Court of Common Pleas, in the name of one C. R., and made returnable to that court at the term to be holden, &c. And your petitioner believes and alleges that said attachment was made fraudulently, and by the procurement of the said I. D.

And your petitioner further represents, that, on the sixth day of said April, certain of the creditors of the said I. D. had an interview with him, and endeavored to obtain from him security for their several debts; at which time the said I. D. agreed to meet the said creditors the next morning and have another interview with them; that he did not so meet them, and although the said creditors made diligent search for the said I. D., they were unable to find him; and your petitioner believes and alleges that the said I. D. intentionally concealed himself in order to avoid arrest.

And your petitioner further represents, that, on the said fifth day of April, the goods and property above mentioned, or a large part thereof, were in the store of the said I. D., at P., and during the night of said day the same were removed from said store; and although, on the sixth day of said April, your petitioner and other creditors of the said I. D. made diligent search for said goods and property, they were unable to find the same; and your petitioner believes and alleges that the said goods and property were removed and concealed by the said I. D., or caused by him to be removed and concealed, in order to prevent them from being attached or taken on any legal process.

And your petitioner further represents, that, on or about the said sixth day of April, the said I. D. did depart from the said P., and did remove himself from the Commonwealth aforesaid; and your petitioner believes and alleges that the said I. D. did remove himself from said Commonwealth with intent to defraud his creditors.

And your petitioner further represents, that, on or about the said sixth day of April, the said I. D. did remove or cause to be removed from his said store at P. the following described goods and property, to wit: [*Here describe the property;*] that the said I. D. did carry and remove the said goods and property, or cause the same to be carried

and removed, from the Commonwealth aforesaid; and your petitioner believes and alleges that the said I. D. did so remove said goods and property from said Commonwealth with intent to defraud his creditors.

By reason of which alleged acts, or either of them, the said I. D. became liable and subject to be proceeded against according to the provisions of the ninth section of the act entitled, "An Act in further Addition to the several Acts for the Relief of Insolvent Debtors, and the more equal Distribution of their Effects."

Wherefore your petitioner prays that a warrant may be issued to take possession of all the estate of the said I. D.; that the same may be distributed among all his creditors, according to the provision of the statute in such case made and provided; and that such further proceedings may be had in the premises as the law in such case prescribes.

May 2, 1853. A. C.

Commonwealth of Massachusetts. S—— ss. On the second day of May, in the year one thousand eight hundred and fifty-three, at B., in the said county of S., personally appeared the above-named A. C., and made oath that the facts set forth in the foregoing petition are true, according to his best knowledge and belief.

Before me, J. P., Justice of the Peace.

The above petition contains an allegation founded upon each of the causes for proceeding against a debtor, enumerated in the statute of 1844, except that of a debtor's procuring himself to be arrested. But of course only such allegations are to be made in any petition as may be required by the circumstances of the case.

Allegation that the Debtor procured himself to be arrested.

And your petitioner further represents, that, on or about the first day of April last, the said I. D. was arrested on a writ (*or* on execution) sued out of the Court of Common Pleas, in the name of one C. R., &c.; and your petitioner believes and alleges that the said I. D. procured himself to be so arrested on said process.

Allegation that the Debtor did not give Bail.

And your petitioner further represents, that the said I. D. was, on or about the first day of March last, arrested for the sum of one hundred dollars or upwards, in a civil action, founded on a demand which in its nature is provable against the estate of said I. D., according to the provisions of the act for the relief of insolvent debtors above mentioned, on a writ sued out of the Court of Common Pleas by one C. R., and made returnable to that court at the term held at B., in the county of S., on the first Tuesday of April last; and your petitioner alleges that the said I. D. did not give bail in said action on or before the return day of said process.

Allegation that the Debtor was imprisoned Thirty Days.

And your petitioner further represents, that the said I. D. was, on or about the tenth day of March last, arrested for the sum of one hundred dollars or upwards, on a writ (*or* execution) sued out of the Court of Common Pleas by one C. R. in a civil action, founded on a demand which in its nature is provable, &c.; and your petitioner alleges that the said I. D. was actually imprisoned on said process for more than thirty days.

Allegation that a Debtor did not dissolve an Attachment.

And your petitioner further represents, that, on or about the fifth day of February last, the goods of the said I. D., situated in his store at B., were attached on mesne process, for the sum of one hundred dollars or upwards, in a civil action, founded on a demand which in its nature is provable, &c., on a writ sued out of the Court of Common Pleas by one C. R., and made returnable to that court at the term held at B., in the county of S., on the first Tuesday of April last; and your petitioner alleges that the said I. D. did not dissolve said attachment within seven days from the said return day (*or* did not dissolve said

attachment before the last day of the said term to which said writ was returnable, which term did not continue so long as seven days).

The conclusion of a petition containing statements and allegations founded solely upon the statute of 1838, or upon that as amended by the statute of 1844, should be varied accordingly.

Warrant to the Messenger.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., Esquire, a Commissioner of Insolvency. In the matter of I. D., of B., in the said county of S., merchant, an insolvent debtor.

[L. S.]

To the sheriff of said county of S., or either of his deputies: You are hereby required, as messenger, to take possession of all the estate, real and personal, of said insolvent debtor, excepting such as is by law exempted from attachment, and of all his deeds, books of account, and papers, and keep the same safely, until the appointment of an assignee or assignees. And you are also required to give public notice by advertisements, to be published twice inside, in each of the newspapers called the "D. A.," and the "B. P.," printed at B., the first publication to be made forthwith, — 1. That this warrant has issued; 2. That the payment of any debts, and the delivery of any property belonging to said insolvent debtor, to him, or for his use, and the transfer of any property by him, are forbidden by law; 3. That a meeting of the creditors of said insolvent debtor will be held at my office, in said B., on the twentieth day of May, present, at ten o'clock in the forenoon, for the proof of debts and the choice of an assignee or assignees. And you will there have this warrant, with your doings thereon. Witness my hand and seal, this second day of May, in the year one thousand eight hundred and fifty-three.

J. M. W., Commissioner of Insolvency.

Advertisement by the Messenger.

Messenger's Notice. J. M. W., Esquire, Commissioner of Insolvency for the county of S., has issued a warrant against the estate of I. D., of B., in said county of S., merchant, an insolvent debtor; and the payment of any debts, and the delivery of any property belonging to said insolvent debtor, to him, or for his use, and the transfer of any property by him, are forbidden by law. A meeting of the creditors of said debtor will be held at the office of the said commissioner, in said B., on the twentieth day of May, present, at ten o'clock in the forenoon, for the proof of debts, and the choice of an assignee or assignees.

May 2, 1853. D. S., Deputy Sheriff, Messenger.

Messenger's Return upon the Warrant.

B——, May 20, 1853. By virtue of the within warrant to me directed, I have taken possession of all the estate of the within named I. D., except such as is by law exempted from attachment, and of all his deeds, books of account, and papers, which have come to my knowledge. And I have given public notice of the issuing of the within warrant, and of the other things therein prescribed, by an advertisement published twice inside in the newspapers called the "D. A." and the "B. P.," within mentioned; the first publication of which advertisement was made on the third day of this present May.

D. S., Deputy Sheriff, Messenger.

The messenger, in his written return, should state truly his actual doings by virtue of the warrant. If, in fact, no estate has come to his knowledge, he should so state; as also the means which he has used to discover any.

Debtor's Schedules.

LIST OF CREDITORS OF I. D., AN INSOLVENT DEBTOR.

Names of Creditors.	Residence.	Nature of Claims.	Consideration.	Security.	Amount.
C. R.	Boston.	Note.	Mdse.	None.	$1500.00
A. L.	N. York.	Acct.	Goods.	None.	1311.16
M. S. &c. &c.	Boston.	Two Notes.	House and Land in N.	Mortg. on same premises.	4000.00

May 2, 1853. I. D.

In the debtor's schedule of his property, he should make a list of all his estate, real and personal, state where it is situated, and describe it with sufficient particularity to enable the assignee to take possession of it.

Acceptance by the Assignee.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., Esquire, Commissioner of Insolvency in and for the said county of S. In the matter of I. D., of B., in the said county, an insolvent debtor. To A. E., of B., in the said county, merchant: You are hereby notified that you have been duly appointed assignee of the estate of the said insolvent debtor.

L. C., Clerk.

B——, May 20, 1853. I hereby accept the office of assignee of the estate of the said insolvent debtor.

A. E.

Assignment.

Commonwealth of Massachusetts. S—— ss. In insol-
[L. S.] vency: Before J. M. W., Esquire, Commissioner of Insolvency. In the matter of I. D., of B., in the said county of S., merchant, an insolvent debtor.

Whereas, A. E., of B., in said county of S., merchant, has been duly appointed assignee in said case: Know all men by these presents, that I, the said commissioner of insolvency, by virtue of the authority vested in me by a

statute of this Commonwealth, entitled "An Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," passed April 23, 1838, and of the several acts in addition thereto, do hereby convey and assign to the said assignee all the estate, real and personal, of the said insolvent debtor, including all the estate of which he was possessed, or which he was interested in or entitled to, on the third day of May, present; excepting such parts thereof as have been or shall be left in his hands, as being by law exempted from attachment, with all his deeds, books, and papers relating thereto. To have and to hold, all the above-granted premises to the said A. E., his heirs and assigns. In trust nevertheless, upon the trusts, and for the uses and purposes, set forth in the acts aforesaid. In witness whereof, I, the said commissioner of insolvency, have hereunto set my hand and seal, on the twentieth day of May, in the year one thousand eight hundred and fifty-three.

J. M. W., Commissioner of Insolvency.

Order for the Second Meeting.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., Esquire, a Commissioner of Insolvency for the said county of S. In the matter of I. D., of B., in said county of S., merchant, an insolvent debtor.

To A. E., of B., in the said county of S., merchant: You having been duly appointed assignee in said case, are hereby required to give notice thereof, and to call the second meeting of the creditors of the said insolvent debtor, to be held at the office of the subscriber, in said B., on Friday, the first day of July next, at ten o'clock in the forenoon, and to publish notice thereof on two different days, inside, in the newspapers called the "D. A." and the "B. P.," printed at B.; at which meeting creditors may be present and prove their claims. You are also directed to give written notice, by mail or otherwise, of the time and place of the said meeting, to all the known creditors of the said insolvent debtor. And you are further directed to make return at said meeting of this order, with your doings herein. Witness my hand, this tenth day of June, in the year one thousand eight hundred and fifty-three.

J. M. W., Commissioner of Insolvency.

Assignee's Return upon his Order.

B——, July 1, 1853. I have complied with all the directions of the within order to me directed, as therein required. A. E.

The order for subsequent meetings may be in the form of that for the second, omitting the direction to the assignee to give notice of his appointment, and adding a direction to render his account.

Notice to Creditors.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., Esquire, a Commissioner of Insolvency. In the matter of I. D., of B., in the county of S., merchant, an insolvent debtor.

A meeting of the creditors of said insolvent debtor will be held on Friday, the first day of July, 1853, at ten o'clock in the forenoon, at the office of the said commissioner of insolvency, in said B.

B——, June 10, 1853. A. E., Assignee.

Oath.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., Esquire, a Commissioner of Insolvency. In the matter of I. D., of B., in the county of S., merchant, an insolvent debtor. On Friday, the first day of July, in the year 1853.

I, I. D., do swear, that the account of my creditors contained in the schedule made and signed by me, and now in the hands of the assignee chosen by my creditors, is in all respects just and true, according to my best knowledge and belief. And I do further swear, that I have delivered to D. S., the messenger appointed in that behalf, all my estate, (excepting such parts thereof as are by law exempted from attachment, and such as have been necessarily expended for the support of myself and my family,) and all my books of account and papers relating to my said estate, that were within my possession or power when the

same were demanded of me by the said messenger; that I have delivered to my assignee all such of my said estate, books, and papers, as have since come to my possession; and that, if any other estate, effects, or other things, which shall or ought to be assigned and delivered to the said assignee, shall hereafter come to my knowledge or possession, I will forthwith disclose or deliver the same to the said assignee. And I do further swear, that there is not any part of my estate or effects made over or disposed of in any manner for the future benefit of myself or my family, or in order to defraud my creditors. I. D.

S—— ss. Subscribed and sworn to, this first day of July, A. D. 1853.

Before me, J. M. W., Commissioner of Insolvency.

Notice of an Appeal by a Creditor whose Claim is rejected.

In the case of I. D., an insolvent debtor, now pending before J. M. W., Esquire, a Commissioner of Insolvency for the county of S.

L. R., of N., in the county of E., merchant, whose claim against the said I. D. was presented at a meeting of his creditors, held on the first day of this present July, and then disallowed by the said commissioner, appeals from the said decision of the commissioner, to the Supreme Judicial Court, next to be held at B., within and for the said county of S., on the second Tuesday of November next; and he prays that this notice may be entered on the record of the proceedings in the case aforesaid. L. R.

B——, July 2, 1853.

To the said J. M. W., Esquire, and to L. C., his clerk, and A. E., the assignee of the estate of the said I. D.

Assignee's Account.

The first account of A. E., assignee of the estate of I. D., an insolvent debtor.

The assignee charges himself as follows: —

With the proceeds of the sale of the debtor's stock of goods, as per schedule annexed, marked A.	$ 1,167.45
With sundry debts collected, as per schedule annexed, marked B.	716.21
With the proceeds of the sale of the debtor's right to redeem certain real estate situated in N.	165.00
	$ 2,048.66

And asks allowance of the following payments and charges: —

Messenger's fees and expenses, ...	$ 6.50
Advertising notice of second and third meetings,	2.00
Fees of the commissioner of insolvency, . .	20.00
Do. clerk, ...	35.00
For services as assignee in settling said estate, .	100.00
Balance in the hands of the assignee, . .	1,885.16
	$ 2,048.66

B——, November 19, 1853. A. E.

Assent of Creditors to granting a Certificate to the Debtor.

To J. M. W., Esquire, a Commissioner of Insolvency within and for the county of S. In the case of I. D., an insolvent debtor, now pending before the said commissioner of insolvency, the undersigned, creditors of the said I. D., whose claims have been proved and allowed against his estate, hereby signify their assent to the granting of a certificate of discharge by the said commissioner of insolvency to the said debtor.

B——, November 19, 1853. C. R.
A. L.
&c., &c.

Order of Distribution.

Commonwealth of Massachusetts. S—— ss. In insolvency: Before J. M. W., a Commissioner of Insolvency

for the county of S. In the matter of I. D., of B., in the county of S., merchant, an insolvent debtor.

A. E., assignee of the estate of the said I. D., has this day rendered the first account of his trust, and notice thereof having been duly given, and the same appearing to be just and true, I now order that the said account be allowed; showing a balance in the hands of the said assignee, amounting to the sum of eighteen hundred eighty-five dollars and sixteen cents.

And I hereby order and direct the said assignee to pay and distribute the sum of eighteen hundred nine dollars and twenty-nine cents to and among all the creditors of the said insolvent debtor whose debts have been proved and allowed; paying to them severally the sums hereunder set against their respective names, being fifty cents on a dollar of their said debts, as follows, to wit: —

Names of Creditors.	Residence.	Debts Proved.	Dividends.
C. R.	Boston,	$ 1,512.50	$ 756.25
A. L.	New York,	1,311.16	655.58
A. C.	Boston,	200.00	100.00
&c., &c.			

And I further order and direct the said assignee to pay the sum of twenty-five dollars and seventy-nine cents to the creditors hereunder named, whose claims have been proved and allowed as privileged debts, for costs of suit, paying to them respectively the full amount of their said debts, as follows: —

Names of Creditors.	Residence.	Debts Proved.
A. C.	Boston,	$ 7.51
&c., &c.		

And I further order the said assignee to retain in his hands the residue of said balance, amounting to the sum of fifty dollars and eight cents, to be accounted for hereafter according to law.

Given under my hand, this nineteenth day of November, in the year eighteen hundred and fifty-three.

J. M. W., Commissioner in Insolvency.

Certificate of Discharge.

Commonwealth of Massachusetts. S—— ss. To all people to whom these presents shall come, I, J. M. [L. S.] W., a Commissioner of Insolvency for the said county of S., send greeting: —

Whereas, it has been made to appear to me, that I. D., of B., in the said county of S., merchant, whose estate has been assigned for the benefit of his creditors, according to the provisions of an act made and passed on the twenty-third day of April, in the year one thousand eight hundred and thirty-eight, entitled "An Act for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," and of the acts in addition thereto, has made a full disclosure and delivery of all his estate as in said acts is required; and that he has in all things conformed himself to the directions of the said acts: I do accordingly certify, that, by force of the acts aforesaid, the said I. D. is absolutely and wholly discharged from all his debts which have been or shall be proved against his estate, assigned as aforesaid, and from all his debts which are provable under the said acts, and which are founded on any contract made by him within this Commonwealth, or to be performed within the same, and made since the first-named act aforesaid went into operation; and from all debts which are provable as aforesaid, and which are founded on any contract made by him since the said first-named act went into operation, and due to any persons who were resident within this Commonwealth on the third day of May last, being the day of the first publication of the notice of the warrant issued for the seizure of the estate of the said I. D., and from all demands against him for or on account of any goods or chattels wrongfully obtained, taken, or withheld by him, according to the form of the act aforesaid. And I do further certify, that the said I. D. is, by force of the acts aforesaid, for ever discharged and exempted from arrest or imprisonment, in any suit or upon any proceeding for or on account of any debt or demand whatever, which might have been proved against his estate assigned as aforesaid. *Provided*, always, that no debt created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee, or assignee of an insolvent estate, and coming within the provisions

of the third section of "An Act in further Addition to the several Acts for the Relief of Insolvent Debtors, and for the more equal Distribution of their Effects," passed March 16th, 1844, shall be hereby discharged. Given under my hand and seal, on this twenty-fifth day of November, in the year one thousand eight hundred and fifty-three.

J. M. W.

Order for Compounding Controversies.

Upon the facts stated in the petition of ——, assignee of the estate of the said insolvent debtor, it is ordered that the said assignee be and he hereby is authorized and empowered to compound and settle the claim of —— upon said estate, and all controversies between the said —— and said assignee relating to said estate, by agreement between the said parties, as he shall think proper and most for the interest of all the creditors of the said estate.

Given, &c.

Order of Notice on Petition to stay and vacate Proceedings.

Commonwealth of Massachusetts. Suffolk ss. In insolvency: Before J. M. W., Esquire, Commissioner of Insolvency in and for the said county of Suffolk. In the matter of ——, of B., in said county, merchant, an insolvent debtor.

On the foregoing petition it is ordered that the petitioner give notice to all persons interested in the estate of the said ——, by publishing a copy of the said petition and of this order thereon twice inside in the newspaper called the "D. A.," printed at said B.; the last publication to be three days at least before the time for the hearing thereon herein after mentioned, that they may appear before the commissioner of insolvency in and for said county, at a court of insolvency to be held at the commissioner's room, at ——, in said county, on the —— day of ——, instant, at —— o'clock in the —— noon, then and there to show cause, if any they have, why the prayer of said petition should not be granted.

Given, &c.

Order to stay and vacate Proceedings.

Upon the petition of ——, praying for a stay of the proceedings in insolvency, and that an order be passed vacating all the proceedings, it appearing that due notice has been given to all persons interested in the estate of the said ——, pursuant to the order passed upon said petition, and no objection being made by said insolvent debtor, or by any creditor of said debtor, and that the said petitioner had, at the time of filing the same, proved his debt against the estate. Upon a hearing of the matter of the said petition, It is hereby ordered that the prayer thereof be granted, and that all the proceedings in the said case be, and the same hereby are, vacated and stayed.

Given, &c.

Citation on Complaint of a Creditor.

Commonwealth of Massachusetts. Suffolk ss. In insolvency: Before J. M. W., Commissioner of Insolvency. In the matter of ——, of ——.

To the sheriff of the said county or either of his deputies: These are in the name of the Commonwealth of Massachusetts to require you to cite and summon the said —— to appear before me at a court of insolvency to be holden at ——, on the —— day of ——, at —— o'clock in the ——noon, to be then and there examined concerning the matter of the foregoing complaint.

Hereof fail not, and make return of this precept with your doings thereon at the time and place last aforesaid.

Order for Sale.

Commonwealth of Massachusetts. Suffolk ss. In insolvency: It appearing to the commissioner of insolvency in and for the county of Suffolk, that a part of the estate of ——, of B., in said county, merchant, insolvent debtor, is likely to deteriorate in value before an assignee can be legally appointed, it is ordered by the said commissioner

that the same be sold at public auction, or at private sale, under the direction of the messenger, as may be for the best interest of all persons concerned, and that the said messenger shall hold the funds received in the place of the estate so disposed of.

Given, &c.

Record.

Record of the proceedings in the case of I. D., of B., in the county of S., merchant, an insolvent debtor.

The original warrant in this case was issued by J. M. W., Esquire, a commissioner of insolvency for the said county of S., on the second day of May, in the year one thousand eight hundred and fifty-three. It was issued on the petition of the said I. D., and was directed to the sheriff of the said county of S., or either of his deputies; and was made returnable on Friday, the twentieth day of May, in the year one thousand eight hundred and fifty-three, at ten of the clock in the forenoon, at the office of the said commissioner of insolvency, in said B. The said commissioner also appointed L. C., of said B., Esquire, to be clerk in this case. And the said L. C. was, on the said second day of May, in the year eighteen hundred and fifty-three, duly sworn before the said commissioner, to the faithful discharge of the duties of his said office, as appears by a certificate thereof, made and signed by the said commissioner, and annexed to the said petition.

And now, on this twentieth day of May, in the year one thousand eight hundred and fifty-three, at the office of and before the said commissioner, D. S., one of the deputies of the said sheriff, made return of the said warrant, whereby it appeared that he had duly executed the same according to the precept thereof; and the said warrant and return were filed in the case. It appeared, also, by the said return, that the first publication of the issuing of the said warrant, and of the other matters required to be so published, was made on the third day of May, in the year eighteen hundred and fifty-three. He also produced a schedule of the creditors of the said I. D., made and signed by him, and the said I. D. produced a schedule of his assets; which schedules are in the hands of the assignee.

The said commissioner then proceeded to receive and examine the proof of the debts claimed by the several creditors who were present, or represented at the said meeting; and made a schedule, certified under his hand, of all the debts then proved before him; which schedule is filed in this case, and is hereunder recorded.

Schedule of Debts due from I. D., of B., in the County of S., Merchant, an Insolvent Debtor, to the several Creditors hereunder named, this day proved and allowed before J. M. W., Esquire, a Commissioner of Insolvency for the said county of S.

To C. R., of Boston, on a note made by said I. D., dated Nov. 10, 1845, payable to said C. R. in four months, for	$ 1,500.00	
Add interest from March 13 to May 2, 1846, ...	12.50	
		$ 1,512.50
To A. L., of N. Y., for balance of the account between him and said I. D., ...		1,311.16
To A. M., of Boston, on a note dated April 1, 1846, payable to A. C., and indorsed to said A. M., in sixty days, for	500.00	
Deduct interest from May 2 to June 2, 1846, ...	2.50	
&c. &c.		497.50
		$ 3,321.16

Witness my hand, this twentieth day of May, A. D. 1853.

J. M. W.

The creditors of the said I. D., who had proved their debts as aforesaid, then chose A. E., of said B., to be assignee of the estate of the said I. D., and the said A. E. thereupon in writing accepted the said trust. And the assignment of the said estate was dated on the twentieth day of May, in the year one thousand eight hundred and fifty-three. No further business was transacted at the said meeting in relation to the said estate.

Second Meeting.

And now on this first day of July, in the year one thousand eight hundred and fifty-three, the second meeting of the said creditors was held at the said commissioner's office, in said B., of which due notice has been given by the said assignee, pursuant to the order of the said commissioner. At which meeting the said commissioner received and examined the proof of the debts claimed by the several creditors who were present or represented at the said meeting; and made a schedule, certified under his hand, of all the debts then proved before him; which schedule is filed in the case, and is hereunder recorded.

[*Insert the schedule as in the record of the first meeting.*]

At the same meeting the said I. D. personally appeared, and took and subscribed the oath, by law prescribed, which is filed in the case. No further business was transacted at the said meeting in relation to the said estate.

Third Meeting.

And now, on this nineteenth day of November, in the year one thousand eight hundred and fifty-three, the third meeting of the said creditors was held at the said commissioner's office, in said B., of which due notice has been given by the said assignee, pursuant to the order of the said commissioner. At which meeting the said commissioner received and examined the proof of the debts claimed by the several creditors who were present or represented at the said meeting; and made a schedule, certified under his hand, of all the debts then proved before him; which schedule is filed in the case, and is hereunder recorded.

[*Insert the schedule as before.*]

The said assignee then produced his first account, which was examined by the said commissioner of insolvency, and is filed in the case, showing that he now has in his hands the sum of eighteen hundred eighty-five dollars and sixteen cents, of the estate of the said I. D., and the said commissioner thereupon ordered a dividend to be paid

among all the said creditors who had proved, of fifty cents in the dollar, upon and in proportion to their several and respective debts.

Discharge.

And now, on this twenty-fifth day of November, in the year one thousand eight hundred and fifty-three, at the office of and before the said commissioner, it appearing to the satisfaction of the said commissioner that the said I. D. had made a full disclosure and delivery of all his estate, as by law required, and that he had in all things conformed to the directions of the act in this behalf provided, the said commissioner granted to the said I. D. a certificate thereof, and of his discharge according to law, which certificate is hereunder recorded.

[*Here record the certificate.*]

And it appearing that no part of the said estate remained to be further disposed of, the said commissioner ordered the said case to be closed and the papers to be returned into court.

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